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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 113

BERNARD M. DECKER, United States District Judge, et al.,

Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC, et al.

Respondents.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 20, 1970
CERTIORARI GRANTED MAY 4, 1970

LIST OF CONTENTS

	PAGE
Relevant Docket Entries	1a
Plaintiffs' Motion for Production of Documents Under Rule 34, Filed July 28, 1969	3a
District Court's Order of August 7, 1969	6a
District Court's Memorandum Opinion of October 7, 1969	7a
District Court's Order of October 17, 1969	22a
Petition for Writ of Mandamus, Filed October 20, 1969	22a
Answer to Petition for Writ of Mandamus, Filed November 6, 1969	37a
Seventh Circuit's Orders of October 20 and 29, 1969	57a
Seventh Circuit's Opinion and Order of February 4, 1970	59a
Seventh Circuit's Order of February 11, 1970	67a
Seventh Circuit's Order of March 11, 1970	68a
Affidavits Relating to the Debriefing Statements At Issue	71a

APPENDIX

DATES ON WHICH RELEVANT PLEADINGS WERE FILED, HEARINGS CONDUCTED AND ORDERS ENTERED

July 28, 1969

Filing of Plaintiffs' Motion for Production of Documents and Supporting Affidavit.

August 7, 1969

Hearing before Judge Decker with respect, inter alia, to Plaintiffs' Motion for Production of Documents.

August 7, 1969

Order by Judge Decker directing that defendants file under seal those documents requested by plaintiffs' July 28, 1969 Motion which defendants contend are protected by the attorney-client privilege and/or the work product doctrine, "accompanied by a precise factual statement setting forth the circumstances under which [each such] document was prepared," and establishing a briefing schedule with respect to defendants' claims of attorney-client privilege and work product protection.

August 21, 1969

September 22, 1969

Filing of factual statements called for by Judge Decker's August 7, 1969 Order, and briefs with respect to defendants' claims of attorney-client privilege and work product protection.

September 25, 1969

Hearing before Judge Decker with respect to defendants' claims of attorney-client privilege and work product protection.

October 7, 1969

Judge Decker's Memorandum Opinion with respect to defendants' claims of attorney-client privilege and work product protection.

October 17, 1969

Hearing before Judge Decker on defendants' motion that his ruling with respect to defendants' claims of attorney-client privilege and work product protection be certified for appeal under 28 U.S.C. § 1292(b).

October 17, 1969

Order by Judge Decker implementing his opinion of October 7, 1969 with respect to the claims of attorney-client privilege and work product protection, and denying certification.

October 20, 1969

Filing of Petition for Writ of Mandamus and Emergency Motion for Stay.

October 20, 1969

Order of Seventh Circuit granting emergency motion for stay.

November 6, 1969

Filing of Answer to Petition for Writ of Mandamus.

February 4, 1970

Opinion of Seventh Circuit, and order implementing that opinion.

March 11, 1970

Order of Seventh Circuit clarifying opinion of February 4, 1970.

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

STATE OF ILLINOIS, et al., Plaintiffs v. HARPER & ROW PUBLISHERS, INC., et al., Defendants		No. 67 C 1899 And Related Cases

PLAINTIFFS' MOTION FOR PRODUCTION OF DOCUMENTS UNDER RULE 34

Plaintiffs hereby move this Court for an order pursuant to Rule 34 of the Federal Rules of Civil Procedure requiring all defendants in these consolidated proceedings to produce and to permit the plaintiffs to inspect and copy, or cause to be copied, the documents specified below that are now in their possession, custody or control. It is requested that for each document the paragraph of the motion in response to which it is produced should be indicated.

Definitions

"Defendants" shall mean the corporate defendants named in the pending treble damage complaints, their predecessors, subsidiaries, affiliates, divisions and branches thereof, wherever located, and by whatever trade name known; and all officers, directors, sole proprietors, partners, owners, employees, agents, representatives, or any person owning any interest in, having any position with, or employed by defendants.

Except where otherwise stated, "document" shall mean any written, recorded or graphic matter, however produced or reproduced, prepared during the period from January 1966 to July 1969, inclusive, wherever located,

whether in the possession, custody or control of the defendants or of any official, employee or agent of the defendants, including documents which did not leave the possession of the person who prepared them, including copies where originals are not available. Unless otherwise specified, the documents found by the defendants are to be produced instead of newly made copies thereof.

"Wholesaler" shall mean any person or company which buys books from publishers and resells them to schools, libraries, governmental bodies, or bookstores.

"Library editions" shall mean children's books in special library bindings, or children's books in reinforced bindings sold primarily to schools and libraries, or children's books which have a "net price."

"Trade editions" shall mean children's books which are not "library editions."

Documents to be Produced
by all Defendants

1. All memoranda, reports, summaries, notes, and correspondence which refer or relate to the testimony of any employee or former employee of the defendants in connection with the grand jury investigation instituted in the Northern District of Illinois, docketed as 66 G.J. 3003, which led to the filing of civil complaints on April 18, 1967, against eighteen publishers of library editions of children's books.

2. All discount schedules relating to the sale of trade editions or library editions of children's books to wholesalers for the years 1966, 1967, 1968 and 1969.

3. All schedules, announcements, bulletins or lists indicating the prices and/or terms upon which defendants offered or sold trade editions, or offered or sold library editions of children's books to schools and libraries during the years 1966, 1967, 1968 and 1969.

4. All documents, reports and memoranda prepared during the years 1966 through 1969, inclusive, which refer or relate, in whole or in part, to:

(a) the pricing policy of the defendants or other publishers or wholesalers for the sale of trade editions, or for the sale of library editions of children's books to schools and libraries;

(b) the discount policy of the defendants or other publishers for the sale of trade editions, or for the sale of library editions of children's books to wholesalers;

(c) reports from salesmen about the practices of other publishers or wholesalers and/or the prices charged by other publishers or wholesalers on the sale of trade editions, or on the sale of library editions of children's books to schools and libraries;

(d) adoption of a policy for the pricing, sale and marketing of library editions of children's books to schools and libraries to comply with the terms of the consent decrees in the civil actions brought by the federal government;

(e) meetings between any defendants, or between any defendant and another publisher or wholesaler which concerned the pricing, sale or marketing policy followed with respect to trade editions or library editions of children's books; and

(f) the added cost per book of producing a library edition as opposed to a trade edition.

5. All correspondence between a defendant and any other defendant, any publisher, and any wholesaler during the years 1966 through 1969, inclusive, which refers or relates to the matters enumerated in paragraph 4 above.

6. Documents showing the total sales of trade editions and library editions of children's books for the years 1966, 1967, 1968 and 1969.

(Names of counsel omitted)

Dated: July 28, 1969.

In The United States District Court

(Caption—No. 67 C 1899, etc.)

ORDER

Upon a showing of good cause, the plaintiffs' Rule 34 motion dated July 28, 1969, is granted and defendants shall produce for inspection and copying the documents enumerated therein on or before August 21, 1969, except that the documents enumerated in paragraphs 2 through 6 in said motion shall be produced on or before September 15, 1969; provided that if any defendant objects to the production of any document described in paragraph 1 of plaintiffs' motion on the grounds of "attorney-client" or "work-product" privilege, such defendant on or before August 21, 1969, shall file said document in a sealed envelope, accompanied by a precise factual statement setting forth the circumstances under which the document was prepared. The defendants shall on or before August 28, 1969, file briefs in support of the privilege claimed with respect to the document submitted under seal. Plaintiffs shall have until September 5, 1969, to file answering briefs on these issues. The factual statement to be filed by August 21, 1969, and all briefs shall be served upon all parties on the service list.

Enter:

/s/ Bernard M. Decker
United States District Judge

Dated: August 7, 1969.

MEMORANDUM OPINION
of October 7, 1969

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

STATE OF ILLINOIS, Plaintiff, -vs- HARPER & ROW PUBLISHERS, INC., et al., Defendants. AND RELATED CASES.	No. 67 C 1899

MEMORANDUM OPINION

Pursuant to 28 U.S.C. § 1407, more than forty separate antitrust actions have been transferred to this court for consolidated discovery and pretrial proceedings. Originally instituted in eight judicial districts, the private treble damage suits seek compensation from publishers and wholesalers for alleged conspiracies which inflated the prices for children's editions of library books. The plaintiffs are state and local governments, public schools, and public libraries.

In an ambitious discovery program, the parties have deposed approximately one hundred witnesses during the last four months. Since many of the central events occurred six to ten years ago, the deponents' memories are often incomplete. Some witnesses have been deliberately evasive. Other deponents have forgotten major incidents involving the alleged price fixing and cannot remember receiving incriminating correspondence. Deposition testimony sometimes conflicts with documentary evidence

which the witnesses personally prepared several years ago. The plaintiffs therefore seek to inspect the grand jury transcripts of eleven witnesses who testified about three years ago.[1] In addition, the public schools and libraries ask that the publisher and wholesaler defendants produce all debriefing memoranda that summarize the deponents' grand jury testimony.

After discussing whether the grand jury transcripts should be released, this opinion will outline the procedure which will govern the disposition of additional requests for the disclosure of transcripts. Then, the defendants' two objections to revealing their debriefing documents, the attorney-client privilege and the work product doctrine, will be analyzed.

I. GRAND JURY TRANSCRIPTS.

Rule 6(e) of the Federal Rules of Criminal Procedure declares that:

> "[Persons] may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding . . . No obligation of secrecy may be imposed upon any person except in accordance with this rule."

The disclosure of grand jury minutes is committed to the sound discretion of the trial judge. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (1959). In cases of particularized need, the long established policy of grand jury secrecy is lifted discretely and limitedly. To illustrate, in *United States* v. *Procter & Gamble*, 356 U.S. 677, 683 (1958), the Supreme Court explained that "the use of the grand jury transcript at the trial to impeach

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[1] In 1966 the federal government convened a criminal grand jury to investigate the pricing of library editions of children's books. Although nearly ninety witnesses testified, the United States decided not to seek indictments.

a witness, to refresh his recollection, to test his credibility and the like" constitute particularized need.[2] See *Dennis* v. *United States*, 384 U.S. 855, 873-874 (1966).

A. *In Camera Inspection*

Plaintiffs want to examine the transcripts of John Callway, Joseph Christie, Francis H. Dyckman, Jr., S. Gordon Ferguson, Alan C. Hood, Thomas Maher, Paul D. Rust, Frank Scioscia and James L. Thompson.[3] The publishers and wholesalers maintain that the transcripts are sought purely for discovery purposes. But the vast majority of the witnesses are beyond the subpoena power of the forum court. The depositions are therefore evidentiary. The use of grand jury minutes to refresh the deponents' recollection or to impeach their statements is equivalent to their use at trial.

During the depositions, each witness demonstrated a remarkable lack of memory concerning critical events in controversy. This court's *in camera* inspection of the witnesses' grand jury transcripts reveals that each witness' recall was substantially more extensive in 1966. In each instance, there exist material discrepancies on important factual issues or significant facts that the witness failed to recollect. *Compare Atlantic City Electric Co.* v. *A.B. Chance Co.*, 313 F.2d 431, 434 (2nd Cir. 1963); *Con-*

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[2] *Compare United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940):

> "[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

[3] Two additional grand jury witnesses, James F. Heidelberger and William J. Hoocker, are either deceased or too sick to be deposed. Other than a declaration of relevancy, plaintiffs have advanced no showing of particularized need. Moreover, the testimony recorded in the transcripts of Heidelberger and Hoocker would be inadmissible at trial. Accordingly, these transcripts will not be released.

solidated Edison Co. of N.Y. v. *Allis-Chalmers Mfg. Co.*, 217 F.Supp. 36, 38 (S.D. N.Y. 1963). Furthermore, as Judge Boldt stated in *In re Sellers*, 32 F.R.D. 473, 477 (N.D. Ill. 1962):

> "[T]he likelihood that the witness' recollection will become even dimmer by the time of trial is itself an important reason for allowing disclosure at this stage of the proceedings."

In the interest of justice, there is a compelling need for the disclosure of the requested minutes.

The most relevant parts of the transcripts are interwoven with the remainder of the witnesses' testimony, so that various portions should not be segregated from one another. The entire transcripts will be released since they contain no extraneous matter. Neither the votes nor the deliberations of the grand jurors appear in the minutes.

The following protective order will guard the integrity of all released minutes:

> "The transcript is provided solely for the personal perusal of counsel and shall be used only for such further interrogation of deponents as may be authorized. No part of the transcript shall be copied or reproduced, and the entire transcript shall be returned to this court when its use has been completed."

See *Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce*, 323 F. 2d 233, 237 (5th Cir. 1963).

B. Additional Transcripts.

Since the public schools and libraries will undoubtedly seek to inspect additional grand jury minutes, the procedure governing their release may appropriately be discussed at this time.[4]

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[4] The conclusions reached in this section also provide an alternative ground for releasing the nine transcripts considered in part *I.A. supra*.

Five policy reasons have traditionally been advanced for imposing secrecy upon grand juries.[5] The only relevant justification for secrecy here is encouraging free future disclosure by individuals with information about antitrust violations. See *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 486, 490 (E.D. Pa. 1962). In particular, since potential witnesses are normally employees, customers or suppliers of the offenders, the witnesses might suffer retaliation if their testimony became public. On the other hand, *Dennis* v. *United States*, 384 U.S. 855 (1966), significantly eroded the principle of grand jury secrecy when its main justification is encouraging the subsequent disclosure of crimes. In criminal prosecutions, the witnesses' grand jury minutes must be furnished directly to the defendant once particularized need is established, thus publicizing the earlier testimony.

Moreover, the Supreme Court indicated that a showing of particularized need varies depending upon the impor-

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[5] See *United States* v. *Rose*, 215 F.2d 617, 628-629 (3rd Cir. 1954):

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

See also *United States* v. *Procter & Gamble*, 356 U.S. 677, 681 n.6 (1958).

tance of maintaining secrecy in each individual situation.[6] When a treble damage suit is tried, grand jury witnesses are usually called to testify. Their earlier disclosure may then become public knowledge, thus exposing them to potential retaliation. Release of the grand jury minutes during discovery merely advances the same dangers created at trial.[7] In his dissent to *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 406 (1959), Mr. Justice Brennan explicated that:

> "Disclosure of his testimony before the grand jury is hardly likely to result in any embarrassment that his trial testimony has not already produced. 'If he tells the truth, and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm . . . which his testimony on the open trial does not equally tend to produce.' 8 Wigmore, Evidence (3d ed. 1940), § 2362, at 725."

Furthermore, relatively little secrecy surrounds the 1966 children's books grand jury. The defendants' attorneys con-

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[6] "Certainly in the context of the present case, where the Government concedes that the importance of preserving the secrecy of the grand jury minutes is minimal and also admits the persuasiveness of the arguments advanced in favor of disclosure, it cannot fairly be said that the defense has failed to make out a 'particularized need.'" 384 U.S. 871-872.

[7] After reviewing the judiciary's increasing willingness to release grand jury minutes, Mr. Justice Fortas recently declared that:

> "These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." 384 U.S. at 870.

Dennis v. *United States*, 384 U.S. 855, 870 (1966). While the Supreme Court has not yet authorized automatic disclosure in treble damage actions, the scope of discovery is normally wider in civil litigation than in criminal prosecutions.

tacted numerous witnesses immediately after their appearance and recorded the substance of the witnesses' testimony in debriefing memoranda.[8] After preparing their own testimony summaries, other witnesses circulated their debriefing statements to their corporate superiors. The publishers' and wholesalers' reliance upon the principle of grand jury secrecy is designed to conceal from the public schools and libraries relevant information which the defendants have already assembled.

During the nine depositions discussed in part *I.A. supra*, the witnesses were repeatedly unable to recall significant facts. What recollection they could muster was often so vague as to be of only limited value. Their testimony sometimes conflicted with documentary evidence, including correspondence to and from the witnesses themselves. Since the importance of preserving the instant grand jury minutes is minimal, *in camera* analyses will not be conducted in the future if the public schools and libraries demonstrate similar recalcitrance and unexplained failures to remember.[9] Such a showing will constitute particularized

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[8] One law firm interviewed at least ten witnesses, including several employees of unrelated companies.

[9] In a related context, Chief Judge Pence explained that:

> "It is now well settled that disclosure rather than suppression of relevant materials in grand jury minutes ordinarily promotes the proper administration of justice, both civil and criminal, and it is no longer necessary in every case that the trial judge, like a fussy hen, scratch through the grand jury transcript *in camera* before permitting disclosure of relevant testimony therein."

State of Washington v. American Pipe & Const. Co., 41 F.R.D. 59, 63-64 (S.D. Cal. 1966).

need justifying the release of the witnesses' grand jury transcripts.[10]

II. DEBRIEFING MEMORANDA.

Plaintiffs' examination of additional grand jury minutes will require that a witness first be deposed. As a more complete aid to discovery, the public schools and libraries therefore seek to inspect the debriefing memoranda which were prepared soon after the witnesses testified before the grand jury. The debriefing statements are essentially factual summaries of the witnesses' testimony.[11] The documents may substantially refresh future deposition recollection, thereby rendering extensive transcript requests unnecessary. Furthermore, the debriefing statements may discuss relevant aspects of the alleged price fixing conspiracy which

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[10] Having invaded the grand jury secrecy by their debriefing of the witnesses, the defendants have advanced no compelling policy justification for withholding the transcripts from the plaintiffs. Therefore, the public schools and libraries may be entitled to examine the minutes prior to deposing the witnesses. Rather than releasing the minutes in a wholesale fashion, the court might disclose only the transcripts of those witnesses whom the plaintiffs actually expect to question. But, the broad holding of *United States* v. *Procter & Gamble*, 356 U.S. 677, 683 (1958), suggests that such a decision could be appropriate for certification under 28 U.S.C. § 1292(b), thus completely halting discovery for many months. At this stage of the litigation, an early release of the minutes does not warrant the substantial delay which might ensue.

[11] The memoranda were filed with this court in sealed envelopes, accompanied by a precise factual statement specifying how the documents were prepared.

In their briefs, several defendants object strenuously to any unsealing of the envelopes, including *in camera* inspection. The envelopes therefore remain unopened. But as a consequence, ambiguities and omissions in defendants' factual statements have necessarily been construed against them.

were not probed by the grand jury, thus supplementing the minutes which will be released today.[12]

When the debriefing documents were prepared, counsel often assisted witnesses in their recollection.[13] Defendants therefore resist production under F.R.C.P. 34, maintaining that the documents are insulated by the attorney-client privilege and by the work product doctrine.

A. *Attorney-Client Privilege.*

Communications from a client to a lawyer may be immune from discovery. See, *e.g., Radiant Burners, Inc.* v. *American Gas Ass'n.*, 320 F.2d 314, 324 (7th Cir. 1963).[14] Either of two varieties of the attorney-client privilege can exist. First, when the debriefing statements were prepared, counsel and the witnesses may have had a personal attorney-client relationship. While numerous defendants claim such immunity, they failed to present any factual support for their assertions. With one exception,[15] the attorneys did not (1) render personal legal advice after the witnesses completed their grand jury testimony, (2)

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[12] For example, in order to clarify the scope of the grand jury's inquiry, a witness may have specified that there were no questions concerning various enumerated incidents of dubious legality. Such a debriefing statement could be valuable to refresh a witness' recollection or to impeach deposition statements.

[13] The memorandum may have been designed to circumvent the secrecy surrounding grand juries. By aggregating the statements from most subpoenaed witnesses, antitrust defendants might determine what evidence was presented to the grand jury.

[14] The Seventh Circuit held that the attorney-client privilege protects "confidential disclosure of information by the client to its attorney to gain the legal advice sought thereby."

[15] Prior to Bonsal's grand jury appearance, his lawyers prepared wills for the family, thus establishing a personal attorney-client relationship. Bonsal's debriefing memorandum will be returned unopened.

advise them on other personal matters, or (3) bill the witnesses for their services. Since the lawyers' respective law firms were counsel for the witnesses' employers, the debriefing consultations were apparently conducted as a favor to the corporations. The documents are thus not protected by a personal attorney-client privilege.

Second, a corporate attorney-client privilege could have existed. See, *e.g.*, *United States* v. *United Shoe Machinery Corp.*, 89 F.Supp. 357, 359-360 (D. Mass. 1950); *Radio Corp. of America* v. *Rauland Corp.*, 18 F.R.D. 440, 443 (N.D. Ill. 1955). But only communications from certain employees to the company's attorney create that relationship. Specifically, a responsible member of the corporation's management or control group must seek legal advice about corporate affairs. See, *e.g.*, *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F.Supp. 483, 485 (E.D. Pa. 1962).[16] Moreover, the corporate official must be in a position to influence the decision about which legal counsel is sought. In *Natta* v. *Hogan*, 392 F.2d 686, 692 (10th Cir. 1968), the Tenth Circuit stated that:

> "[T]he test is whether the person has the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer, or is an authorized member of a group that has such power."

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[16] "[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice."

See also *Garrison* v. *General Motors Corp.*, 213 F.Supp. 515 (S.D. Cal. 1963).[17]

In the instant cases, the debriefing memoranda were created to assist the publishers and wholesalers in defending the actions instituted by the federal government and private treble damage plaintiffs. Only Bonsal and Milne were in a position to influence their company's litigation strategy in these lawsuits.[18] While other witnesses, such as sales executives and regional managers, might have shaped the pricing policies concerning library editions, they did not participate in the corporate problem about which legal advice was sought—the company's litigation response to the price fixing cases. Accordingly, the debriefing documents are not protected by a corporate attorney-client privilege.

B. *Work Product Doctrine.*

The work product doctrine protects counsel's legal strategies and thought processes from discovery by an adversary. *Hickman* v. *Taylor*, 329 U.S. 495, 509 (1947). The principle does not, however, insulate non-legal services rendered by persons who happen to be attorneys.

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[17] Defendants rely heavily upon *Continental Oil Company* v. *United States*, 330 F.2d 347, 349 (9th Cir. 1964). In an abbreviated opinion, the Ninth Circuit concluded that personal and corporate attorney-client relationships existed. The Court did not analyze which corporate officials' consultations create the privilege.

[18] These individuals' memoranda will be returned in the sealed envelopes.

Mr. Milne "participated in—and in some instances controlled—the decisions which William Morrow and Company made in connection with the corporate conduct which forms the basis of these actions."

The statements may be divided into two categories.[19] In the first group, the lawyers functioned primarily as investigators. By asking questions and recording the answers, they attempted to reconstruct the witnesses' grand jury testimony. Such peripheral participation by a lawyer does not convert a factual summary into his work product. In *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 46-47 (S.D. N.Y. 1951), Judge Weinfield expounded that:

> "The rationale underlying . . .[*Hickman* v. *Taylor*] was intended to apply only when [an attorney] acts in his true professional capacity.
>
> "It is a fair inference that the procurement of the statements . . . was not the result of any basic professional relationship between the lawyer . . . and the defendant, or that it required the training, skill and knowledge of a lawyer or the essential integrity implicit in the lawyer-client relationship. The services were those normally rendered by an investigator or claim agent . . ."

See *Diamond* v. *Mohawk Rubber Co.*, 33 F.R.D. 264, 267 (D. Colo. 1963).

Second, certain statements, such as those of Hoocker and Rowe, contain counsel's "recollections, observations, comments and impressions about [the witness'] report of his appearance before the grand jury." Assuming *arguendo* that these nebulous additions constitute work product, these documents are only entitled to limited pro-

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[19] According to Golden Press, Inc., its document B-1 "is not a debriefing memoranda. . .

> "The document consists primarily of statements by counsel. Only a very small portion of the memoranda concerns statements made by the witness during the course of his examination by the grand jury."

The statement will therefore be returned to the defendant.

tection since they remain basically summaries of testimony.[20]

Under F.R.C.P. 34, work product materials may properly be examined by the opposing party if there exists good cause or special circumstances which justify invading the attorney's thought processes. See, *e.g., Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 207 F.Supp. 407, 410-411 (M.D. Pa. 1962).[21] In determining whether good cause has been established, the harm caused by revealing lawyers' work product is compared with the need for discov-

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[20] Counsel have not indicated that their professional abilities were utilized; presumably, the documents do not include legal analysis nor do they discuss litigation strategy.

If the mere physical involvement of an attorney converted documents into work product, parties could easily insulate damaging evidence from an adversary. Alternative discovery procedures, such as depositions and the production of related materials, might be less revealing than the documents clothed with immunity.

[21] Contrast *Allmont* v. *United States*, 177 F.2d 971, 978 (3rd Cir. 1950), and *Hauger* v. *Chicago, Rock Island & Pacific Railroad Co.*, 216 F.2d 501, 507 (7th Cir. 1954), in which the moving parties failed to make the requisite showing of good cause. Nevertheless, the Seventh Circuit explained that:

> "The presence of special circumstances might, of course, constitute good cause for the entry of an order to produce such statements for examination." 216 F.2d 507.

Judge Robson denied discovery of work product statements in *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 211 F.Supp. 736, 741 (N.D. Ill. 1962), because:

> "Plaintiffs in their brief admit that no showing of good cause along traditional lines has been presented. They argue that the unique character of this litigation is of itself a sufficient showing of good cause for production."

ery. In *United States* v. *Swift & Co.*, 24 F.R.D. 280, 284 (N.D. Ill. 1959), Judge Hoffman thus declared that:

> "The privilege of the lawyer's work product and the showing of good cause sufficient to overcome it are interdependent, and when, as here, the factors supporting the claim of privilege are weak, the requisite showing of good cause is correspondingly lessened."

The instant antitrust cases are unusual because the alleged price fixing conspiracy was particularly active six to ten years ago. Although the plaintiffs have voluminous documents available for examination and have deposed a large number of witnesses, the intervening years continue to obscure many crucial factual questions. The witnesses have long since forgotten the details of their operations; frequently, they cannot even remember major incidents in which deviations from "net" prices were punished. Quite regularly, witnesses confronted with copies of their own letters have little or no recall. Similarly, deponents often do not remember receiving incriminating correspondence, nor do they offer reasonable explanations for apparent admissions that their prices were illegally inflated. If the conspiracy existed, plaintiffs' inability to prepare fully for trial results from the publishers and wholesalers' concealment of the price fixing. As public bodies, the plaintiff schools and libraries are charged with a responsibility to protect the taxpayers' finances.

When compared to the defendants' minimal work product claims, the plaintiffs' need for discovery establishes good cause under F.R.C.P. 34. Plaintiffs have demonstrated special circumstances which justify the disclosure of counsel's comments and notations that were interspersed among the factual summaries of grand jury testimony. See, *e.g.*, *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 47 (S.D. N.Y. 1951); *Zenith Radio Corp.* v. *Radio Corp. of America*, 121 F.Supp. 792, 795 (D. Del. 1954); *Sharon Steel Corp.* v. *Travelers Indemnity Co.*, 26 F.R.D. 113, 115 (N.D. Ohio 1960). Accordingly, except for the Bonsal and Milne documents, all debriefing memo-

randa may be examined by the plaintiffs. The statements will not be returned to the defendants at this time.

III. CONCLUSION.

Nine of the requested grand jury transcripts will be released since the plaintiffs have demonstrated particularized need. The importance of maintaining secrecy is minimal in these consolidated cases. In the future, grand jury minutes will be released without an *in camera* inspection if plaintiffs establish that the deponents have a glaring failure of memory or that their testimony contradicts reliable documentary evidence.

With respect to the debriefing documents, only the Bonsal memorandum is privileged because of a personal attorney-client relationship. Similarly, the corporate attorney-client privilege protects only the Bonsal and Milne documents. The other witnesses were not members of the corporation's control group. Finally, none of the documents is immunized by the work product doctrine since counsel's peripheral participation is outweighed by the compelling need for discovery in these actions.

Enter:

/s/ Bernard M. Decker
United States District Judge.

Dated: October 7, 1969.

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 67 C 1899)

ORDER

Upon a showing of good cause as set forth and discussed in this Court's Memorandum Opinion of October 7, 1969,

It Is Hereby Ordered that all debriefing statements previously filed with this Court in sealed envelopes, pursuant to the order entered on August 7, 1969, shall be released by the Clerk of this Court directly to liaison counsel for plaintiffs for inspection and copying, with the exception of the debriefing statements taken from grand jury witnesses George Bonsal, James Milne and Golden Press witness "B-1" which shall be returned to the respective defense counsel involved.

Enter:

/s/ Bernard M. Decker
Bernard M. Decker
District Judge

Dated: October 17, 1969.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Harper & Row Publishers, Inc., et al., Petitioners, v. Honorable Bernard M. Decker, United States District Judge, Respondent.	No. 18008 Original Petition for Writ of Mandamus

PETITION FOR WRIT OF MANDAMUS

Now come the below listed petitioners and petition this Court:

a. To issue a rule upon respondent, Honorable Bernard M. Decker, Judge, United States District Court for the Northern District of Illinois, to show cause why a writ of mandamus should not issue in this case;

b. To issue a writ of mandamus compelling respondent to vacate his order dated October 17, 1969, which permits plaintiffs to inspect and copy approximately 30 memoranda, all but one of which were prepared by petitioners' attorneys after they conferred with various grand jury witnesses. Copies of that order and of respondent's October 7, 1969 opinion upon which the order was based are appended hereto as Exhibits A and B;

c. To issue a writ of mandamus compelling respondent to return to petitioners' attorneys all of the memoranda in question without permitting any person to inspect or copy those memoranda;

d. To issue an order staying respondent's order of October 17, 1969, pending disposition of this petition for a writ of mandamus; and

e. To issue an order granting petitioners leave to file a brief in support of this petition within 15 days thereafter, and establishing a schedule for the filing of an answering brief in opposition to this petition and a reply brief in support of it.

STATEMENT OF FACTS

1. Commencing in the spring of 1966, many employees, former employees and/or agents of petitioners appeared as witnesses before one or more federal grand juries which were investigating various aspects of the publishing industry. Some of these witnesses also were represented individually by the same attorneys who represented their corporate employers (petitioners here). The corporate

employers were potential targets of the grand jury investigation, and both the employers and the individual witnesses were potential defendants in antitrust treble damage actions. Indeed, one such treble damage action had been commenced against certain petitioners even before the memoranda in question were prepared.

2. Petitioners' attorneys conferred with these witnesses prior to and following their respective grand jury appearances. Thereafter those attorneys, in the course of representing their corporate and individual clients generally and/or in connection with pending and impending judicial proceedings, prepared memoranda which contained their thought processes and impressions as well as statements of the witnesses—which statements all those concerned believed were being divulged to the attorneys in confidence. All of the memoranda in question were prepared by the attorneys except one, which was prepared for the attorney by the witness himself, under the direction and with the active assistance of the attorney.

3. Most of the memoranda in question were retained by the attorneys in their files and were never given to the witnesses or to their corporate employers. In a few instances, however, a copy of a particular memorandum was given to an officer of the corporate employer of the witness in question.

4. No indictment was returned as a result of the grand jury investigations. On April 18, 1967, the Justice Department instituted 18 separate civil actions for injunctive relief. The complaint in each of those 18 actions named only a single defendant (a publisher of children's books), and no wholesalers were named as defendants in any of those actions. The gist of each complaint was resale price maintenance, involving the relationship between the single named publisher-defendant and the wholesalers

which distributed library editions of that publisher's children's books.

5. On October 23, 1967, consent decrees were filed in each of the 18 government actions; the decree in each action was agreed to by the Justice Department and by the single defendant named therein. Each of those consent decrees expressly stated that it did not constitute an "admission by either party in respect to any issue". On November 27, 1967, Judge Marovitz approved and entered the 18 consent judgments.

6. Thereafter, numerous multi-party antitrust treble damage actions relating to library editions of children's books were filed in various district courts throughout the United States. Those actions were consolidated for pretrial purposes in the United States District Court for the Northern District of Illinois. Petitioners are some of the publisher and wholesaler-defendants in these treble damage actions; many of petitioners, however, were not defendants in the above-described government actions.

7. On July 28, 1969, plaintiffs in these treble damage actions filed a Rule 34 motion, paragraph 1 of which sought production of "all memoranda, reports, summaries, notes, and correspondence which refer or relate to the testimony of any employee or former employee of the defendants in connection with the grand jury investigation", including memoranda prepared by attorneys. On August 7, 1969 respondent ordered petitioners to submit under seal all memoranda as to which they claimed the protection of either the attorney-client privilege or the work-product doctrine. At the same time, respondent ordered petitioners to file, with respect to each such memorandum, "a precise factual statement setting forth the circumstances under which the document was prepared", and he also ordered the parties to file briefs dis-

cussing the applicable legal principles. A copy of respondent's August 7 order is appended hereto as Exhibit C.

8. On or about August 21, 1969, petitioners' attorneys submitted the memoranda in question under seal, and simultaneously filed the descriptive statements which respondent had requested. Thereafter, on or about August 28, 1969, petitioners filed briefs discussing the significant legal questions which were presented by plaintiffs' motion for production of those memoranda, and the reasons why the attorney-client privilege and the work-product doctrine were applicable to preserve the confidentiality of the memoranda.

9. In early September, plaintiffs filed a brief contending that neither the attorney-client privilege nor the work-product doctrine protected the confidentiality of the memoranda in question, and petitioners thereafter filed reply briefs discussing those issues. On September 25, 1969, respondent entertained oral argument as to the propriety of disclosing the memoranda to the plaintiffs. A copy of the transcript of that proceeding is appended hereto as Exhibit D.

10. In an opinion dated October 7, 1969, respondent held that all but three of the memoranda submitted under seal were to be turned over to plaintiffs. In the same opinion, respondent held that plaintiffs could inspect the entire transcript of the grand jury testimony of nine of the eleven individuals whose grand jury testimony plaintiffs had sought to examine; nevertheless, memoranda relating to the grand jury testimony of those nine individuals are among the memoranda in question here. Respondent's October 7 opinion also stated that in the future additional grand jury transcripts would be released to plaintiffs, upon a showing that particular witnesses had

demonstrated "recalcitrancy and unexplained failures to remember" at their depositions (Respondent's opinion, p. 10).

11. On October 17, 1969 respondent entered an order authorizing plaintiffs to inspect and copy the attorneys' memoranda in question (Exhibit B hereto). Petitioners moved for the inclusion in that order of a statement of certification pursuant to 28 U.S.C. § 1292(b), but respondent denied that motion. In doing so, respondent made an additional statement of his views; a transcript of that statement is attached hereto as Exhibit E. Immediately thereafter, petitioners moved for an order staying the disclosure of the memoranda for five days, and respondent granted that motion.

ISSUES PRESENTED

Whether mandamus should issue because respondent exceeded his power and authority, and abused his discretion, by making the following holdings:

1. That the attorney-client privilege, which was held to be applicable to communications between corporate clients and their attorneys in *Radiant Burners, Inc.* v. *American Gas Association*, 320 F.2d 314 (7th Cir. 1963), cert. den. 375 U.S. 929 (1963), applies to preserve the confidentiality of communications between a corporate employee and counsel for the corporation *only* if the corporate employee is (1) "a responsible member of the corporation's management or control group", who is (2) seeking "legal advice about corporate affairs", *and* who also is (3) "in a position to influence the decision about which legal counsel is sought" (Respondent's opinion, p. 14).

2. That, at the time of the interviews to which the memoranda in question relate, no attorney-client relation-

ship existed between the attorneys and the individuals being interviewed (even though the attorneys and the individuals believed that such a relationship did exist), *merely* because "the attorneys did not (1) render personal legal advice after the witnesses completed their grand jury testimony, (2) advise them on other personal matters [unrelated to their grand jury testimony], or (3) bill the witnesses for their [legal] services" (Respondent's opinion, p. 13).

3. That many of the memoranda in question were not prepared by attorneys acting in their professional capacities and utilizing their professional expertise, and hence did not constitute attorneys' work product (Respondent's opinion, pp. 16-17).

4. That "special circumstances" exist here which make disclosure of the memoranda to plaintiffs "essential to the preparation of [plaintiffs'] case and in the interest of justice" *Alltmont* v. *United States*, 177 F.2d 971, 978 (3rd Cir. 1950), cert. den. 339 U.S. 967 (1950); *Hauger* v. *Chicago, Rock Island & Pacific Railroad Co.*, 216 F.2d 501, 507 (7th Cir. 1954) (Respondent's opinion, pp. 18-20).

STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

1. Petitioners will be prejudiced irreparably if they are not afforded immediate review through mandamus of respondent's extraordinary curtailment of the attorney-client privilege. Respondent's decision raises questions of law which are of vital concern not only to petitioners but also to the Bar in general. With respect to the attorney-client privilege, while the lower court cases are not in complete accord, none has gone so far as respondent has gone in narrowing the scope of the privilege and limiting its effectiveness. With respect to work product,

respondent's decision is in conflict even with *Hickman* v. *Taylor*, 329 U.S. 495 (1947), as well as with the decisions of appellate courts which have applied the principles enunciated in *Hickman* v. *Taylor*.

Respondent's decision involves much more than a mere exercise of judicial discretion. In particular, the attorney-client privilege is available as a matter of law, not as a matter of judicial discretion. Thus respondent had no authority or power to deprive petitioners (or the individuals whose communications are involved) of the protection of that privilege for the erroneous reasons given in his opinion. Since respondent has ordered that the memoranda in question be disclosed to plaintiffs immediately, no other method of obtaining effective review of respondent's decision is available, and the confidentiality of the memoranda will be lost irretrievably unless review by mandamus is authorized.

2. Respondent's order has the effect of depriving *corporate* clients of the protection of the attorney-client privilege in the vast majority of situations where that privilege is important to them. An attorney cannot advise and represent a client adequately unless the client can tell the attorney frankly and in confidence all of the facts which are relevant to the issue regarding which advice is sought. The attorney-client privilege, of course, is designed to permit and indeed to encourage such disclosures, which would not be made so freely if an adverse party could then obtain detailed information about them by discovery addressed *to the attorney*.

The relevant facts often, and perhaps usually, are not known first hand to the executives who control a corporation's litigation strategy—the only corporate personnel with whom respondent would permit a corporation's attorneys *to* communicate confidentially. If the control

group theory is adopted and applied as it has been here, a corporation's attorney could not conduct confidential interviews in the vast majority of situations in which an *employee*—such as a driver, mechanic, salesman or sales manager, or even a vice president not in a "control capacity"—acted on behalf of the corporation, and has knowledge of relevant facts. The facts as to which legal advice was sought could be obtained in confidence only through a controlling officer who might have no familiarity with, or first-hand knowledge of, those facts. Moreover, a corporation's attorney would in many instances be precluded from providing legal advice on a confidential basis to those corporate employees whose duties and responsibilities most require that they receive such advice—*e.g.*, sales personnel, to whom advice regarding compliance with the Robinson-Patman Act would be particularly important. The rule adopted by respondent would effectively deprive corporate clients of the right to soundly based legal advice which the attorney-client privilege is designed to protect, and would deprive the public of the benefits which result when soundly based legal advice deters clients from committing violations of the law.

Whether the attorney-client privilege should be so drastically restricted clearly presents an issue which warrants review by this Court. This is particularly true in view of the fact that in *Radiant Burners, Inc.* v. *American Gas Association*, 320 F.2d 314, 323-324 (7th Cir. 1963), cert. den. 375 U.S. 929 (1963), although this Court declined to decide the scope of the attorney-client privilege as it relates to corporate clients, it did at the same time state (1) that "Where a corporation is the client it must act through its officers and agents", (2) that "problems concerning confidentiality will necessarily vary" according

to the size of the corporate client involved, and (3) that those problems were "competently met" by Judge Leahy in *Zenith Radio Corp.* v. *Radio Corp. of America*, 121 F.Supp. 792, 795 (D. Del. 1954), and by Judge Wyzanski in *United States* v. *United Shoe Machinery Corporation*, 89 F.Supp. 357, 359 (D. Mass. 1950). Both of those decisions are inconsistent with the "control group" test adopted by respondent; those decisions hold that the attorney-client privilege applies to preserve the confidentiality of communications between a corporation's attorney and employees of the corporation who are *not* within a "control group", so long as the communications are made in confidence for the purpose of, or in connection with, the seeking and furnishing of legal advice to the corporation (as is true of all of the communications at issue here).

3. Respondent's order also imposes novel and severe limitations upon the right of *individuals* to utilize the absolute protection which traditionally has been afforded by the attorney-client privilege. Respondent's decision in effect holds that the privilege does not preserve the confidentiality of a communication between an individual and his attorney, if that attorney also happens to represent the individual's employer, unless the attorney had subsequently or on other occasions represented the individual, or had charged him a fee for the services in question. These stringent and completely unprecedented tests have no basis in reason or in policy. Customarily when an individual and his employer are both involved on the same side of a legal controversy involving the employee's actions on behalf of his employer, the employer's attorneys act on behalf of both, and the employer pays the attorneys' fees. Respondent's test, however, would make utilization of the attorney-client privilege exceptionally difficult in such circumstances.

The public interest in the maintenance of the attorney-client privilege—one of the most important reasons for the existence of that privilege—is not even mentioned in respondent's opinion. Not only does that opinion limit the ability of counsel to obtain the relevant facts and information without which the giving of sound legal advice (which long has been a matter of public concern) is impossible; of equal, if not greater, importance is the fact that respondent's opinion significantly limits the effectiveness of the legal advice which can be given.

Under respondent's opinion, the attorney-client privilege is available only when a corporation's attorney advises the corporation's president, or a limited number of executives belonging to the corporation's control group; according to respondent, that privilege is not available to preserve the confidentiality of communications wherein a corporation's attorney gives legal advice to the hundreds or thousands of other corporate employees or agents who presumably are less well informed, and more in need of such advice, than the members of the corporation's "control group". Thus if respondent's opinion is permitted to stand, those employees least able to afford it would be required to employ personal counsel, at their own expense, in order to have the benefit of the attorney-client privilege, and thereby to obtain competent and confidential legal advice about how to conduct themselves in the activities which they engage in on behalf of their corporate employers. If an employee is foreclosed from communicating freely with his corporation's attorney regarding matters relating to his corporation's business, he well might perform acts which soundly based legal advice would have prevented, thereby subjecting both himself and his corporate employer to liability. In this respect, respondent's opinion will have serious adverse

consequences, by depriving the public of the beneficial deterrent effects which result when attorneys are permitted confidentially to obtain all relevant facts, and to give legal advice based thereon. This is particularly inappropriate in view of the increasing emphasis which the Bench, the Bar and our society generally have placed upon the importance of making sound legal advice readily available to all citizens, regardless of their ability to pay attorneys' fees.

4. Respondent's order also impairs the protection which traditionally has been afforded to preserve the confidentiality of attorneys' work product. The work-product doctrine manifestly is applicable to preserve the confidentiality of a memorandum which an attorney has prepared (or helped to prepare) in the course of representing his clients generally, and/or in connection with specific pending and impending legal proceedings. This is particularly true where, as here, those memoranda are professional products which reflect the attorney's questions and analyses, as well as his utilization of professional expertise to elicit, analyze and evaluate information which he considered relevant and material.

Respondent has stated that some of the attorneys' memoranda in question are not work product because each is a mere "factual summary" of a witness' statements to an attorney (Respondent's opinion, p. 16). But there is no support in the record for respondent's assumption regarding the contents of the memoranda; indeed, respondent has admitted that he did *not* examine any of the memoranda (Respondent's opinion, p. 11). Even if respondent's assumption were correct, however, an attorney's summary of a witness' statements to the attorney (other than a shorthand transcript) inevitably will reflect the attorney's reactions to, and evaluation of, those state-

ments. In this respect respondent's holding that many of the attorneys' memoranda are not work product is inconsistent with *Hickman* v. *Taylor*, 329 U.S. 495 (1947), where the Supreme Court held to be work product "all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for defendants" (329 U.S. at 499); attorney Fortenbaugh had "privately interviewed the survivors [of an accident] and took statements from them with an eye toward the anticipated litigation; the survivors signed these statements . . ." (p. 498). The Court held such statements to be work product, without undertaking any inquiry as to how much of the reaction of the lawyer was reflected in his summary of what the witnesses had said, and without reference to the fact that the witnesses in question were outsiders *not* employed by the attorney's client. *A fortiori*, this Court should protect the confidentiality of the memoranda in question here, which are not merely "interview memoranda" and which relate to individuals who were not "outsiders".

5. Attorneys' work product should not be disclosed to an adverse party in the absence of "special circumstances" which make such disclosure "essential to the preparation of [the adversary's] case and in the interest of justice." *Alltmont* v. *United States*, 177 F.2d 971, 978 (3rd Cir. 1950), cert. den. 339 U.S. 967 (1950); to the same effect, see *Hauger* v. *Chicago, Rock Island & Pacific Railroad Co.*, 216 F.2d 501, 507 (7th Cir. 1954). Respondent's opinion holds that even if the attorneys' memoranda in question are work product, "special circumstances" exist which justify disclosure of those memoranda to opposing counsel. Respondent's finding of "special circumstances", however, is based upon facts which are neither special nor unusual, and indeed which are present in virtually every antitrust treble damage action. Respondent has based

his finding of "special circumstances" primarily upon his statements (1) that "because the alleged price fixing conspiracy was particularly active six to ten years ago, * * * the intervening years continue to obscure many crucial factual questions", and (2) that "if the conspiracy existed, plaintiffs' inability to prepare fully for trial results from * * * [defendants'] concealment of the price fixing" (Respondent's opinion, pp. 19-20). In those respects, however, the instant litigation does not differ from any other antitrust treble damage action in which the plaintiff has alleged conspiratorial price fixing and the concealment thereof, and no authority has even suggested heretofore that such factors constitute "special circumstances" which warrant disclosure of attorneys' confidential work product. Indeed, in the electrical equipment antitrust cases attorneys' memoranda, quite similar to those in issue here, were held to be protected by the work-product doctrine. *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 211 F.Supp. 736, 741 (N.D. Ill. 1962); *City of Philadelphia* v. *Westinghouse Electric Corp.*, 32 F.R.D. 350 (E.D. Pa. 1962).

Equally inappropriate is respondent's suggestion that the requisite "special circumstances" exist merely because *some few* deponents have been unable to recall relevant incidents, "do not remember receiving incriminating correspondence", and/or "have little or no recall" when "confronted with copies of their own letters" (Respondent's opinion, p. 19). Although nearly 100 individuals have already been deposed in this litigation; plaintiffs below have complained about the allegedly poor memory of only nine of those deponents, and respondent already has permitted plaintiffs to inspect the entire transcript of the grand jury testimony of each of those nine individuals. In addition, respondent's October 7 opinion ex-

pressly states that plaintiffs will be permitted to examine the transcript of the grand jury testimony of other individuals who at their depositions "demonstrate similar recalcitrance and unexplained failures to remember" (Respondent's opinion, p. 10):

Clearly, then, respondent is both willing and able to provide plaintiffs with the grand jury testimony of individuals whose memories are poor. What basis is there for also disclosing to plaintiffs the attorneys' memoranda which relate to that same testimony—memoranda which contain the attorneys' comments and the results of their thought processes? Even more illogical, however, is respondent's suggestion that merely because nine individuals may have demonstrated "recalcitrance and unexplained failures to remember", there necessarily exist "special circumstances" which warrant the disclosure of attorneys' memoranda relating to more than 20 other individuals who have never even been accused of such conduct and whose depositions may (and in some cases because of death or incompetency will) never be taken.

6. In his oral statement of his views on October 17, respondent suggested that his October 7 opinion is merely an *ad hoc* decision addressed to the facts of this case, and will not have the sweeping effect on the Bar and on the public which petitioners asserted in support of their motion for certification pursuant to 28 U.S.C. § 1292(b). That this may have been respondent's intention is not, however, decisive. Respondent's opinion enunciates and approves several clearly articulated rules relating to the extent of the attorney-client privilege for corporate clients and for individual clients who are employees of corporate clients, and it is difficult to conceive of situations in which those rules might be given more sweeping effect than respondent has given them. Thus whatever respondent's

intention may have been, his opinion will (unless overturned) stand as a barrier to free communication (1) between attorneys for corporations and all corporate officials and employees who are not members of the corporate "control group", and (2) between attorneys for corporations and corporate employees who, having a joint interest with their corporations, wish to be represented by the corporation's attorney without having to pay that attorney's fee personally.

Petitioners respectfully urge that they be given the opportunity to submit a brief containing a more detailed statement of the foregoing reasons why the writ of mandamus should issue, together with an analysis of relevant cases and applicable legal principles.

(Names of counsel omitted)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(Caption—No. 18008)

ANSWER TO PETITION FOR WRIT OF MANDAMUS FILED ON OCTOBER 20, 1969

(Filed Nov 7 1969)

This answer is filed on behalf of the Honorable Bernard M. Decker, United States District Judge, respondent, and on behalf of all plaintiffs in the treble damage antitrust suits now pending in the District Court for the Northern District of Illinois entitled *State of Illinois, et al.* v. *Harper & Row Publishers, Inc., et al.*, No. 67 C 1899 and related cases.[1]

[1] For a full description of the proceedings, plaintiffs refer the Court to the brief in opposition to a previous mandamus petition filed by the defendants and docketed as No. 17320 (1969).

The petitioners — defendants below — seek to compel Judge Bernard M. Decker to vacate a discovery order with respect to production of thirty (30) so-called "debriefing" statements taken from twenty-eight (28) witnesses after they had testified before a federal grand jury investigating price-fixing conspiracies in the sale of library editions of children's books to public schools and libraries. The defendants premise their request for a writ of mandamus upon the contentions that Judge Decker erroneously found (a) the evidence failed to establish that an attorney-client relationship existed, and (b) the plaintiffs had shown good cause and special circumstances for the production of the debriefing statements which outweighed the limited protection afforded by the work-product doctrine.

The defendants have advanced no factual or legal bases to invoke the extraordinary remedy of mandamus. With respect to both rulings attacked by the defendants, Judge Decker applied established legal criteria to the peculiar facts of this case. The sweeping assertions made in the mandamus petition are not supported by any of the evidence or factual material which defendants presented to the District Court, and which necessarily binds them in this proceeding. In many instances, deposition testimony of the witnesses from whom debriefing statements were taken flatly contradicts the conclusory repre-

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It should be noted that The American News Company, a defendant below, voluntarily produced three debriefing statements taken by its attorneys. In addition, Childrens Press, another defendant, submitted five debriefing statements to the District Court, but did not join the petition for writ of mandamus. Accordingly, these debriefing statements were released to plaintiffs pursuant to an order of this Court dated October 29, 1969.

sentation made by defendants. Respondents-plaintiffs, therefore, wish to supplement and correct the record.

STATEMENT OF FACTS

In a nation-wide discovery program pursuant to 28 U.S.C. § 1407, and involving multiple antitrust complaints, plaintiffs have deposed approximately one hundred (100) witnesses in the last several months. Faced with forgetfulness, recalcitrance, and evasiveness by a great number of witnesses, plaintiffs, on July 28, 1969, moved for the production of certain relevant and material documents, including all memoranda relating to the grand jury testimony of any employee or ex-employee of the defendants. On August 7, 1969, the District Court ordered that the defendants submit these documents to the Court, and that any defendant who objected to the inspection of any such document, on the ground of attorney-client privilege or work-product, file a "precise factual statement setting forth the circumstances under which the document was prepared." Thirty-eight (38) debriefing statements were thus submitted under seal with affidavits or statements describing the preparation of the documents and the claim of privilege.

The statements and affidavits submitted to Judge Decker by the defendants setting forth the circumstances under which the debriefing statements were recorded may be briefly summarized;[2]

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[2] Despite the fact that defendants focus their attack against Judge Decker's determination of factual issues, they have not presented their own statements and affidavits which formed a principal part of the evidence available to Judge Decker. We are including as Exhibit 1 the twenty-eight (28) affidavits and statements submitted by defendants pursuant to the District Court's order requiring a factual statement of the circumstances under which each document was prepared.

(a) Eleven of the witnesses interviewed had ceased being employees of the companies prior to the time they testified before the grand jury and submitted to interviews with the corporate attorneys. These are Kessel, Rowe (as to Putnam's), Street, Rose, Gannon, Goldman, Phraener, and Golden Press witnesses "B", "C", "D" and "E".

(b) Two other witnesses, Mathiesen and Rust, were not employed by the company whose attorney interrogated them.

(c) One witness, Callaway, wrote his own recollection of the grand jury testimony. The statements of two other witnesses, Thompson and Moormann, were prepared from dictaphone tape recordings, with the final drafts approved by the witnesses.

(d) Only with regard to fourteen witnesses was it even contended that the corporate lawyers were also acting as personal counsel.[1] In no instance is it claimed by a defendant that any of the grand jury witnesses formally or personally hired the attorney or paid him any fee. Only the Golden Press affidavits relating to witnesses "A" and "B" allege that the attorneys gave legal advice to the grand jury witnesses they interviewed, but even this occurred *before*, rather than after, the witness testified.

(e) Only two witnesses were officers of the corporation whose lawyers conducted the interviews; the others were employees. Of all the affidavits filed, only those relating to Messrs. Bonsall and Milne even suggest that the grand jury witness participated in corporate decision-

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[1] The witnesses involved are Bonsall, Callaway, Street, Hood, Thompson, Moormann, Stokes, Heidelberger, Davidson, Patella, Guerney, Scioscia, and Golden Press witnesses "A" and "B".

making with respect to this antitrust litigation, and their statements were excluded from the discovery order.

(f) A number of the witness interviews (or debriefing sessions) were attended by more than one attorney.

(g) Some of the debriefing statements were admittedly circulated to executives of the defendant involved.[5]

(h) Associates of one law firm conducted at least ten interviews of witnesses who were employees or ex-employees of five different companies.

Judge Decker reviewed the statements and affidavits submitted by the defendants and the deposition testimony of some of the witnesses involved. Thereupon, Judge Decker concluded that the debriefing statements, with one exception, were merely summaries of testimony gathered to ascertain what had occurred before the grand jury and to assist the publishers and wholesalers in defending against potential federal or private action.[6]

Judge Decker found that the defendants had failed to present factual support for their assertions of a personal attorney-client relationship stating:

> "With one exception [the witness Bonsall] the attorneys did not (1) render personal legal advice after the witnesses completed their grand jury testimony,

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[5] The witnesses involved are Callaway, Rowe and Kessel. Although the affiant lawyers in many instances assert that the debriefing statements were not shown to corporate executives, they do not state whether they related the substance of the witness interviews in reporting to the corporate executives. Nor do they assert that confidentiality was either requested or promised.

[6] Having objected to any *in camera* inspection of the debriefing statements filed under seal, defendants should not be heard to criticize Judge Decker for not reading the debriefing statements. See Memorandum Opinion of October 7, 1969, p. 11, ftn. 11; Petition for Writ of Mandamus, p. 16.

(2) advise them on other personal matters, or (3) bill the witnesses for their services. Since the lawyers' respective law firms were counsel for the witnesses' employers, the debriefing consultations were apparently conducted as a favor to the corporations."

Accordingly, Judge Decker ordered Bonsall's statement returned unopened, but held that the other debriefing statements were not shielded from discovery by the personal attorney-client privilege.

In their petition, defendants erroneously assert that "all those concerned believed [their statements] were being divulged to the attorneys in confidence" and that the individuals whose debriefing statements were taken believed that an attorney-client relationship existed at the time of their interview. (Petition, pp. 3, 8) Deposition testimony available from several witnesses flatly contradicts these blanket assertions. For instance, David Rose, an ex-employee of Harper & Row, testified:

"Q. After you testified before the Grand Jury, did you tell anyone about what you told the Grand Jury?

"A. Yes.

"Q. Who was that?

"A. Bill Ashworth of Harper's, *their lawyer.*

"Q. Were they there at the same time or was this two occasions?

"A. No. I simply called Bill Ashworth to tell him I had been out there, and he asked me if I would have any objection to speaking with *their lawyer.* I said 'No.'

"Q. Did you speak to a lawyer?

"A. Yes I did.

"Q. At this time you no longer worked for Harper's, did you?

"A. That is right."

(Rose Deposition Tr. 27; emphasis supplied)

Si Goldman of Macmillan testified that his personal counsel was not present when he was interviewed by certain lawyers after his grand jury appearance, that none of the participating lawyers informed Goldman that what he said would be kept confidential, and that Goldman did not request that his statement be kept confidential. (Goldman Deposition Tr. 43)

Along the same lines, Irving Davidson, a salesman for Grosset & Dunlap, testified that when he was interviewed about what occurred before the grand jury it made no difference to him whether his statement was kept confidential or not.[7] (Davidson Deposition Tr. 17)

The claimed existence of a corporate attorney-client privilege depends upon the establishment by the defendants that the particular witness was a member of the group who participated in the corporate problem about which legal advice was sought. Only the affidavits relating to the interviews of Bonsall and Milne even claimed that the grand jury witness was in a position to influence their company's litigation strategy. Accordingly, Judge Decker returned these two debriefing statements unopened, but held that the other debriefing documents were not protected by a corporate attorney-client privilege.

Judge Decker then turned to an analysis of the facts and circumstances presented by the plaintiffs to establish "good cause" and "special circumstances" for the pro-

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[7] The deposition of Irving Davidson shows that the affidavits submitted by the defendants set forth a partial and evasive description of the circumstances that surrounded the witness interviews. Moreover, defense counsel have sought to prevent the witnesses from revealing the circumstances which vitiate the claim of privilege. Plaintiffs have submitted the relevant pages of Davidson's deposition transcript as Exhibit 2.

duction of the debriefing statements as against the qualified protection claimed for the alleged work-product.

Based upon his review of specified deposition testimony and his *in camera* inspection of the grand jury testimony given by the same witnesses, Judge Decker made the following findings of fact which support the showing of "good cause" and "special circumstances" for the production of the debriefing statements:

(a) "Each witness demonstrated a remarkable lack of memory concerning crucial evidence in controversy" and that "what recollection they could muster was often so vague as to be of only limited value." (Memorandum Opinion, pp. 4, 9)

(b) "Some witnesses have been deliberately evasive," "other deponents have forgotten major incidents involving the alleged price fixing and cannot remember receiving incriminating correspondence," and the "deposition testimony sometimes conflicts with documentary evidence which the witnesses personally prepared several years ago." (Memorandum Opinion, p. 2)

(c) The recall of each witness was substantially more extensive when he appeared before the grand jury, and that "in each instance, there exist material discrepancies on important factual issues or significant facts that the witness failed to recollect." (Memorandum Opinion, pp. 4, 5)

In this context, Judge Decker enumerated several factors justifying release of the debriefing statements to aid plaintiffs in their search for truth:

> "The instant antitrust cases are unusual because the alleged price fixing conspiracy was particularly active six to ten years ago. Although the plaintiffs have voluminous documents available for examination and have deposed a large number of witnesses, the

intervening years continue to obscure many crucial factual questions. The witnesses have long since forgotten the details of their operations; frequently, they cannot even remember major incidents in which deviations from 'net' prices were punished. Quite regularly, witnesses confronted with copies of their own letters have little or no recall. Similarly, deponents often do not remember receiving incriminating correspondence, nor do they offer reasonable explanations for apparent admissions that their prices were illegally inflated. If the conspiracy existed, plaintiffs' inability to prepare fully for trial results from the publishers and wholesalers' concealment of the price fixing. As public bodies, the plaintiff schools and libraries are charged with a responsibility to protect the taxpayers' finances." (Memorandum Opinion, pp. 19-20)

As additional reasons for the discovery order, Judge Decker stated that production of these "documents may substantially refresh future deposition recollection thereby rendering extensive transcript requests unnecessary. Furthermore, the debriefing statements may disclose relevant aspects of the price fixing conspiracy which were not probed by the grand jury, thus supplementing the minutes" released to the plaintiffs. (Memorandum Opinion, p. 11) The significance of this latter finding is graphically illustrated by the following passages from the released debriefing statement of Clarence N. Roland, an ex-employee of Golden Press and Childrens Press.[8]

(a) "*Roland told the debriefers but not the grand jury* that occasionally he did purposely 'lose' orders from discounting jobbers." (p. 5) (emphasis supplied)

(b) "Roland was asked [before the grand jury] if he knew of any instance when the American News Company departed from the net price policy. He said

[8] The debriefing statement of Roland is submitted as Exhibit 3.

that he did, and that in connection with one such infraction he called Mr. Harold Williams (now deceased) of American News.

"Roland elaborated on one of his conversations with Harold Williams. On that occasion he talked to Williams concerning American News price cutting, and noted that American News was enjoying a discount from Golden based on their total purchases. American News obtained this discount despite the fact that books were shipped to the various American News Company branches throughout the United States. Roland told Williams if American News did not adhere to the net pricing policy Golden might change its discount policy, and treat each American News branch as a separate distributor. Such revision in Golden's discount policy would seriously curtail American News Company's purchasing power.

"*Roland told the debriefers, but not the grand jury,* that Huyck [the government attorney] probably learned of Roland's conversation with Williams from Mr. Joe Christie of American News." (pp. 3-4) (emphasis supplied)

(c) "Roland told the debriefers he thought it significant that Huyck never asked him if he knew of any agreement among jobbers to hold the net price line." (p. 10)

The District Court balanced the showing of "good cause" and "special circumstances" against the claim that the debriefing statements should remain secret as work-product of the attorneys who recorded the narratives. Applying well-settled and recent precedents to the circumstances disclosed by the affidavits and deposition testimony, Judge Decker concluded that the factors supporting the claim of work-product were weak. Judge Decker specifically found that for the most part, the lawyers "functioned primarily as investigators" or scriveners; that the lawyers sought to reconstruct what had been said

in the grand jury room (as well as those matters either withheld by the witness or not pursued by the grand jury); that the debriefing statements recorded the recollections of the witnesses; that "the debriefing statements are essentially factual summaries of the witnesses' testimony" before the grand jury; and that the affidavits did not assert that the statements included legal analysis or litigation strategy with the exception of one statement (Golden Press "B-1"), which Judge Decker accordingly excluded from discovery.

ARGUMENT

The only issue raised by the petition for writ of mandamus is whether the District Court properly exercised its discretion to order the limited production of relevant and material documents. The defendants contest Judge Decker's findings that (i) the circumstances under which the debriefing statements were taken did not create a confidential attorney-client relationship, and (ii) the plaintiffs established "good cause" and "special circumstances" for discovery of the debriefing statements, which outweighed "defendants' minimal work product claims." Mandamus is clearly an inappropriate remedy to attack such discovery rulings, especially since Judge Decker's order constitutes an exercise of discretion based upon his appraisal of the facts. This latest effort to frustrate and delay discovery should be summarily rejected.

The defendants have advanced no plausible grounds to invoke the extraordinary remedy of mandamus. The order staying release of the debriefing statements pending conclusion of this action has interrupted and disrupted the discovery program in the consolidated antitrust actions. In these circumstances, plaintiffs submit that the petition for writ of mandamus should be dismissed without further briefing of the issues.

I. MANDAMUS WILL NOT LIE TO REVIEW A DISTRICT COURT'S DISCRETIONARY ORDER FOR THE PRODUCTION OF DOCUMENTS BASED UPON THE DETERMINATION OF FACTUAL ISSUES

It has been consistently held that mandamus will not lie to review a trial court's discovery order unless the aggrieved party shows a clear abuse of discretion and establishes an indisputable right to such drastic relief. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953); *Texas Gulf Sulfur Co.* v. *Ritter*, 371 F.2d 145, 146-147 (10th Cir. 1967). See also *Atlantic City Electric Co.* v. *General Electric Co.*, 337 F.2d 844 (2d Cir. 1964) (appeal denied despite certification of district judge). This doctrine was most recently expressed in *Will* v. *United States*, 389 U.S. 90 (1967), wherein the Supreme Court unanimously reversed the issuance of a writ of mandamus directed against a trial court's discovery order. The opinion stressed that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify invocation of this extraordinary remedy," and cautioned that:

> "Courts faced with petitions for the peremptory writ must be careful lest they suffer theinselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.'" At 95; 98, n. 6.

The power to grant the peremptory writ of mandamus is discretionary with the Court of Appeals, *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1943), and such authority has been used sparingly, especially with respect to rulings upon discovery issues entrusted to the discretion of the trial judge. Thus, courts of appeal have

consistently denied petitions for writ of mandamus to review a finding of good cause for the production of documents. *E.g., Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431 (2d Cir.); *stay denied*, 83 S. Ct. 964 (1963) (Harlan, J.); *Paramount Film Distributing Corp.* v. *Civic Center Theatre*, 333 F.2d 358 (10th Cir. 1964); *In re Illinois Central R.R.*, 192 F.2d 465 (5th Cir. 1951) (writ of prohibition); *Keaton* v. *Kennamer*, 42 F.2d 814 (10th Cir. 1930).

In *American Express Warehousing, Ltd.* v. *Transamerica Ins. Co.*, 380 F.2d 277, 283 (2d Cir. 1967), petitioners sought a writ of mandamus to vacate a discovery order, alleging that the documents were covered by the work-product doctrine. The court of appeals denied the petition and concluded that the decision of the trial court involved the "application of well-known law to commonplace fact, and rested on the district judge's appraisal of facts and exercise of discretion. Whether the order below was correct or not, these bases for it involved no question of first impression."

The additional grounds cited by the opinion for denying the writ of mandamus apply with equal force to this case:

> "Besides the obvious possibilities for abuse in the typical case if a court of appeals were to exercise intermittent supervisory power over discovery in the district courts, we feel that the nature of the present litigation presents another compelling reason for our discretionary refusal to entertain the petition. In a large and complicated lawsuit or series of lawsuits closely related, interlocutory review of such housekeeping matters as discovery would practically preclude termination of the litigation by settlement or trial within the normal lifespan of any of the parties, attorneys or judges." (At p. 284)

The defendants have not questioned the District Court's judicial power to enter the discovery order, nor charged usurpation of that power. They complain rather that Judge Decker erred by ruling that there was no factual basis for most claims of attorney-client privilege and that "good cause" and "special circumstances" existed for the production of the debriefing statements, even in those few instances where the work-product of an attorney was arguably involved. The finding of good cause and the consequent order to produce documents are matters of judgment and discretion, which required the sifting of affidavits and deposition and grand jury testimony to resolve competing interests. The exercise of this discretion cannot be reviewed piecemeal through mandamus proceedings. *Bank Line, Ltd. v. United States*, 163 F.2d 133 (2d Cir. 1947), *Pennsylvania R.R. v. Kirkpatrick*, 203 F.2d 149, 150 (3d Cir. 1953).

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO ORDER THE LIMITED PRODUCTION OF THE DEBRIEFING STATEMENTS PREPARED BY AND FOR THE DEFENDANTS

The petition for writ of mandamus is nothing more than an attack upon the District Court's factual determinations and exercise of discretion. To support plaintiffs' motion that the mandamus petition be denied without further briefs, this answer will summarize the complete lack of substance in each of the defendants' contentions.

A. The District Court properly held that the circumstances described by the defendants did not create a personal attorney-client privilege with respect to certain debriefing statements.

The defendants complain Judge Decker erroneously concluded that certain debriefing statements were not pre-

pared in the course of a personal attorney-client relationship. The defendants' assertion cannot withstand exposure to the evidence. The circumstances revealed by the affidavits of defense counsel themselves and deposition testimony of the witnesses thoroughly discredit the blanket assertion of personal attorney-client privilege made in the mandamus petition.

The District Court concluded from a study of the evidence that the debriefing statements, with one exception, were not protected by a personal attorney-client privilege, expressly finding that the attorneys did not "*render personal legal advice after the witnesses completed their grand jury testimony.*" (emphasis added) The determination of such factual issues lies in the discretion of the trial judge. There is simply no reason advanced in the mandamus petition to warrant review of this crucial finding. The defendants submitted no proof showing that a confidential attorney-client relationship existed when the debriefing interviews were conducted. None of the affidavits submitted stated or even indicated that the alleged client expected or requested that his disclosure be kept confidential.[9] Indeed, a personal attorney-client privilege was only asserted with respect to some witnesses.

Judge Decker's decision constitutes no departure from established law.[10] He recognized the immunity afforded

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[9] Irving Davidson testified to the contrary. Moreover, the admitted circulation of Callaway's statement to the executives of his company vitiates the claim of attorney-client privilege. See *RCA v. Rauland Corp.*, 18 F.R.D. 440, 443 (N.D. Ill. 1955).

[10] He simply applied the black-letter rule that an attorney-client privilege only exists if legal advice is sought in confidence from a professional legal adviser in his capacity as such. 8 Wigmore, *Evidence* § 2292 (3d ed. 1940).

to confidential communications by the attorney-client privilege,[11] but found that the necessary factual indicia of a personal attorney-client relationship were lacking from the record. A disagreement with Judge Decker's appraisal of the evidence does not warrant employment of the extraordinary writ of mandamus.

B. The District Court properly held that the debriefing statements were not protected by the corporate attorney-client privilege.

Judge Decker's rejection of all but two claims of corporate attorney-client privilege accords with the evidence and established case law. The fact that thirteen of the witnesses interviewed were either ex-employees or employees of a different company precludes any assertion of a corporate attorney-client privilege by the defendant company who obtained those debriefing statements.[12]

Judge Decker followed the relevant precedent by ruling that a corporate attorney-client privilege does not extend to interviews with ordinary employees, but only attaches when a responsible member of the corporation's management or control group seeks legal advice about corporate affairs. This test has been consistently applied in recent federal decisions. *E.g., City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F. Supp. 483, 485 (E.D. Pa.), *petition for mandamus denied sub. nom., General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); *Natta* v. *Hogan*, 392 F.2d 686, 692 (19th Cir. 1968); *Garrison* v. *General Motors Corp.*, 213

[11] Where factual support for the claim of privilege was presented, Judge Decker ordered that the debriefing statement "be returned unopened."

[12] *Hickman* v. *Taylor*, 329 U.S. 495, 508 (1947); *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

F. Supp. 515 (S.D. Cal. 1963). See also *Day v. Illinois Power Co.*, 199 N.E.2d 802, 50 Ill. App.2d 52 (1964).[13] Only two witnesses fell into that class, namely Bonsall and Milne, and their debriefing statements were returned.[14]

Judge Decker's decision turned on a close analysis of facts assembled from numerous detailed affidavits, submitted by defendants themselves. The ruling fully accords with precedent in federal antitrust litigation. By expressly limiting his holding to the unique circumstances of this case, Judge Decker heeded the command in *Radiant Burners, Inc.* v. *American Gas Ass'n*, 320 F.2d 314, 324 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963), that the law of corporate attorney-client privilege be applied on a case-by-case basis. The record simply contains no justification for this Court to undertake a review of Judge Decker's well-reasoned exercise of discretion.

C. The District Court properly found that "good cause" and "special circumstances" justified production of the debriefing statements as against the claim of work-product.

Defendants apparently premise their position upon the assertion that the District Court gave too much weight to certain factors in finding good cause and special circumstances. Despite their incantation of the work-product principle, the defendants nowhere contend the discovery order constitutes an abuse of discretion.[15] The failure to

[13] The two earlier cases cited by defendants in support of their contention that the privilege should be expanded may be readily distinguished on their facts.

[14] Since Judge Decker held that the attorney-client privilege covered the only debriefing statement filed by William Morrow & Company, Morrow has no standing to challenge Judge Decker's discovery order.

[15] The extended and hypothetical policy discussions by defendants about the work-product doctrine have no relevance to the facts of this case.

charge abuse of discretion or usurpation of power leaves this Court without jurisdiction to entertain the petition for writ of mandamus.

In any event, Judge Decker's order represents the application of established law to the facts submitted by the defendants. While recognizing that the work-product principle ordinarily protects counsel's legal strategies and thought processes from discovery, the District Court held that the principle did not insulate mere factual summaries of witness interviews. This ruling rests on sound precedent. *E.g., Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 46-47 (S.D.N.Y. 1951), *Diamond* v. *Mohawk Rubber Co.*, 33 F.R.D. 264, 267 (D. Colo. 1963).

Moreover, Judge Decker concluded that even if the debriefing statements contained the work-product of attorneys, the good cause and special circumstances for disclosure outweighed the reasons to maintain the secrecy of these statements.

Comparison of a few excerpts from the debriefing statement and deposition transcript of Clarence N. Roland demonstrates the validity of Judge Decker's finding of special circumstances and emphasizes the need for production in the search for the truth.

a) The debriefing statement recites:

"Roland told Williams if American News did not adhere to the net pricing policy Golden [Press] might change its discount policy, and treat each American News branch as a separate distributor. Such revision in Golden's discount policy would seriously curtail American News Company's purchasing power." (p. 4) But at Roland's deposition, the following colloquy occurred:

"Q. Now I am asking whether . . . you suggested to any official of American News that if the various branches of American News persisted in discounting

Simon & Schuster [Golden Press] books, that Simon & Schuster might refuse to give American News a mass buying discount on all its branches but would, instead, credit each branch only with the purchases that it made?

"A. No." (Tr. p. 18)

b) The debriefing statement recites:

"Roland told the grand jury that the American News Company 'stayed in line' after his talk with Williams." (p. 5)

However, Roland responded as follows in his deposition:

"Q. And were there instances where, after you had spoken to a jobber, his behavior improved?

* * *

"A. Not so that you could notice if you are referring to adhering to our pricing." (Tr. p. 14)

c) The debriefing statement recites:

"He [Roland] said he had threatened to lose the orders of discounting jobbers. . . . Roland told the debriefers but not the grand jury that occasionally he did purposely 'lose' orders from discounting jobbers." (p. 5)

The deposition testimony of Roland was quite different:

"Q. While you were with Simon & Schuster, to your knowledge, was an order sent in by any jobber ever lost or delayed for a time in an effort to get a message across to the jobber?

* * *

"A. No. * * *" (Tr. pp. 19-20)

"Q. . . . Is it your testimony that you recall no instance in which, to your knowledge, Simon & Schuster delayed delivery or lost an order of a jobber because of his discounting activities?

"A. That is correct. * * * we have never, as you have phrased it, lost an order because someone has

not adhered or sold at the net selling price as we suggested." (Tr. pp. 37-8)

d) The debriefing statement recites that Ted Winter and Wally Black of Childrens Press gave Ronald specific instructions "to report violations of the net price policy" and that Roland "followed these instructions." (pp. 6-7)

Once again, Roland's deposition testimony was quite different:

"Q. Did you have any instructions from Mr. Black or Mr. Winter that if there were instances of jobbers selling Children's Press books at less than net price that you should report such incidents?

"A. No, sir." (Tr. p. 31)

Judge Decker weighed the need for discovery against work-product-claims on the basis of standards enunciated in a series of federal decisions. *United States* v. *Swift & Co.*, 24 F.R.D. 280, 284 (N.D. Ill. 1959); *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 211 F. Supp. 736, 741 (N.D. Ill. 1962); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 207 F. Supp. 407, 410-411 (M.D. Pa. 1962). See *Hauger* v. *Chicago, Rock Island & Pacific R.R.*, 216 F.2d 501, 507 (7th Cir. 1954). The consequent determination that the circumstances warranted disclosure of the debriefing statements is fully supported by the evidence presented to the District Court, and by the applicable law. This finding presents no issue which is cognizable upon a mandamus petition.

CONCLUSION

For the reasons set forth above, respondents-plaintiffs respectfully request that the Petition for Writ of Mandamus be denied, that this Court's order of October 28, 1969, be amended by striking the schedule for filing of briefs, and that an order be entered taxing petitioners-defendants with all costs and expenses incurred in presenting this answer.

(Names of counsel omitted)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Monday, October 20, 1969

Before

Hon. Thomas E. Fairchild, Circuit Judge

Harper & Row Publishers, Inc., et al., Petitioners,		Original Petition for Writ of Mandamus.
No. 18098	vs.	
Honorable Bernard M. Decker, United States District Judge, Respondent.		

On consideration of the emergency motion of petitioners, Harper & Row Publishers, Inc., et al., to stay the order entered in the United States District Court for the Northern District of Illinois, Eastern Division, on October 17, 1969, presented to this Court this day in connection with a petition for writ of mandamus,

It Is Ordered that the said order of October 17, 1969, entered by Honorable Bernard M. Decker, United States District Judge, in case No. 67-C-1899 entitled *State of Illinois*, Plaintiff *v. Harper & Row Publishers, Inc., et al.*, Defendants, and related cases, be stayed pending the final disposition by this Court of the petition of Harper & Row Publishers, Inc., et al. for writ of mandamus.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 29, 1969

Before

Hon. Roger J. Kiley, Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

Hon. Walter J. Cummings, Circuit Judge

Harper & Row Publishers, Inc., et al.,

Petitioners,

No. 18008 vs.

Honorable Bernard M. Decker, United States District Judge, et al.,

Respondents.

Original Petition for Writ of Mandamus

ORDER

On consideration of the motion of respondents (plaintiffs below) for clarification of stay order, and the response of petitioners,

It Is Ordered that the stay order entered herein October 20, 1969 is modified so as to permit the release, pursuant to the October 17, 1969 order of Judge Decker which is the subject of our stay order, of the "debriefing statements" taken by attorneys for Children's Press, Inc.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969 JANUARY SESSION, 1970

No. 18008

HARPER & ROW PUBLISHERS, INC., *et al.*,

Petitioners,

v.

HONORABLE BERNARD M. DECKER, United States District Judge,

Respondent.

Petition for Writ of Mandamus

February 4, 1970

Before KILEY, FAIRCHILD and CUMMINGS, *Circuit Judges.*

PER CURIAM. In more than forty separate antitrust actions brought in eight judicial districts, plaintiffs, state and local governments, public schools, and public libraries, sought damages from twenty-three defendants (petitioners here), publishers and wholesalers, for alleged conspiracies to inflate the prices for children's editions of library books. Pursuant to 28 U.S.C. §1407 these actions were transferred for consolidated discovery and pretrial proceedings to the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Bernard M. Decker, presiding. Petitioners seek mandamus to compel the district judge to vacate an order dated October 17, 1969 insofar as it permitted plaintiffs to inspect and copy certain memoranda, all but one of

which were prepared by attorneys while "debriefing" a number of persons (each an employee or former employee of one of petitioners) shortly after each had testified before a federal grand jury investigating various aspects of the publishing industry.

Plaintiffs sought production of these memoranda under Rule 34, F.R.C.P. Petitioners countered with the claim that the debriefing memoranda were protected by the attorney-client privilege or as attorneys' work product. The judge ordered petitioners to submit the memoranda under seal, and to file a precise factual statement setting forth the circumstances of the preparation of each.

The judge did not examine the memoranda. In every instance but two, he decided that neither an attorney-client privilege nor any status as work product excused discovery.

The judge refused to make a certification under 28 U.S.C. §1292(b), for the purpose of appeal. Petitioners sought mandamus, and because an appeal, ultimately, from the final decision would be an inadequate remedy, we ordered an answer and briefs.

The claims made by petitioners fall under the following topics: (1) Whether the relationship between the person interviewed and the attorney was such as to make the communication privileged. (2) Whether the relationship between the person interviewed and the attorney's corporate client was such as to make the communication privileged. (3) Whether the memoranda were protected work product of the attorney. (4) Whether good cause was shown for discovery of work product.

(1) *Whether the relationship between the person interviewed and the attorney was such as to make the communication privileged.*

The judge had before him assertions on this point in affidavits and depositions. In at least three instances

(Davidson, Rose and Rowe), there was a difference between the statement of the attorney and of the person interviewed which raised a degree of ambiguity. There was at least one assertion of the existence of a personal attorney-client relationship with respect to Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Stokes, Street, Davidson, Rose, Rowe, Callaway, and witnesses "A" and "B" of Golden Press.

The judge decided that there was no personal attorney-client relationship in these instances because it failed to appear that the attorney did (1) render personal legal advice to the witnesses, (2) advise them on personal matters, or (3) bill them for services. He concluded that the witnesses talked to the attorneys as a favor to the respective corporations.[1]

Petitioners can not assert the privilege of the individuals, if such privilege existed. The attorneys could presumably assert their obligation to the individuals, although the attorneys are before this court only as counsel for petitioners.

In any event we do not find the existence of personal attorney-client relationships so clearly established that mandamus is appropriate to compel the district court to recognize the privilege which would arise therefrom.

(2) *Whether the relationship between the person interviewed and the attorney's corporate client was such as to make the communication privileged.*

Some of the persons interviewed were no longer employees at the time of the interview; others were employed by one of petitioners at the time of interview, but were interviewed by counsel for another petitioner. Neither group need be considered under this topic.

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[1] The Bonsal memorandum is not involved in this proceeding. The judge found a personal attorney-client relationship and held the memorandum privileged.

Messrs. Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Rowe (as to Thomas Y. Crowell Company), Stokes, Davidson, Callaway, Witness A of Golden Press, Walker, Dyckman, Mitchell, Andrus, and Hoocker were employees of the corporate client at the time of the interview. It is sufficiently clear that each employee made his disclosure to the attorney at the direction of his corporate employer and on its behalf; and that the subject matter of his grand jury testimony and of the debriefing interview was germane to the duties of his employment. On the other hand, although some of these employees had supervisory or even policy making responsibilities with respect to the branch of the corporate business with which they worked, it was not demonstrated that any of these employees was in a position to control or take a substantial part in a decision about action which the corporation may take upon the advice of the attorney, nor that he was a member of a group having that authority.[2]

The district judge substantially followed the "control group" test of the relationship between corporate client and persons making the communication to the attorney which must exist if the communication is to be protected by the corporation's attorney-client privilege. This test was formulated by Judge Kirkpatrick in *City of Philadelphia* v. *Westinghouse Electric Corp.* (E.D. Pa., 1962) 210 F.Supp. 483. A similar test appears in Rule 5-03(a)(3), Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, March, 1969.

If the control group test be wholly adequate, it has not been shown that the district judge erred in his application of it.

Judge Kirkpatrick's control group test has been applied by other courts. *E.g., Natta* v. *Hogan* (10th Cir., 1969), 392 F.2d 686, 692; *Garrison* v. *General Motors Corp.* (S.D.,

[2] The Bonsal and Milne memoranda are not involved in the present proceeding. The judge found that Bonsal and Milne were members of the control group of their employer and held their communications privileged.

Cal., 1963). 213 F.Supp. 515. It has been criticized. Burnham, Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois, 56 Ill. B.J. 542, 545-48 (1968); Heininger, The Attorney-Client Privilege as it Relates to Corporations, 53 Ill. B.J. 376, 384 (1965). Broader tests have been suggested. See Pye, Fundamentals of the Attorney-Client Privilege, 15 Prac. Law. 15, 19 (Nov. 1969); Maurér, Privileged Communication and the Corporate Counsel, 28 Ala. Law. 352, 375 (1967); *D. I. Chadbourne, Inc. v. Superior Court* (1964), 36 Cal. Rptr. 468, 388 P.2d 700, 709.

We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, and that in those instances where the order here under attack must rest entirely upon the control group test, the order is unlawful.

It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.

We conclude that an employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

And because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate.

(3) *Whether the memoranda were protected work product of the attorney.*

We think that the district judge incorrectly suggested that some of the memoranda did not qualify as work product because "the lawyers functioned primarily as investigators." Where an attorney personally prepares a memorandum of an interview of a witness with an eye toward litigation such memorandum qualifies as work product even though the lawyer functioned primarily as an investigator. See *Hauger* v. *Chicago, Rock Island, and Pacific R. Co.* (7th Cir., 1954), 216 F.2d 501; *United States* v. *American Optical Co.*, 37 F.R.D. 233, 238 (E.D. Wis., 1965); *United States* v. *Aluminum Co. of America*, 34 F.R.D. 241, 242-3 (E.D. Mo., 1963). Indeed, the qualified privilege might even attach to a document prepared under the supervision of the attorney even though not drafted by the attorney himself. *Alltmont* v. *United States* (3rd Cir., 1950), 177 F.2d 971; cert. den. 339 U.S. 967 (1950). Of course, the less the lawyer's "mental processes" are involved, the less will be the burden to show good cause. *United States* v. *Swift & Co.* (N.D. Ill., 1959), 24 F.R.D. 280, 284.

(4) *Whether good cause was shown for discovery of work product.*

The judge made specific findings of good cause for permitting plaintiffs to examine the grand jury testimony of nine of the person who were later interviewed by the attorneys. Three of them are not involved in the present proceeding. The debriefing memoranda of five of them, Callaway, Dyckman, Hood, Sciosia and Thompson, we have held protected by the attorney-client privilege of their employers. Rust is the one remaining. The judge found, from comparison of his deposition with his grand jury testimony, that there were material discrepancies and failures to recall significant facts. It seems clear that, insofar as the character of this memorandum as work product remains relevant, good cause was properly found.

We are unable to determine whether the district judge inspected any depositions other than those taken from the above mentioned nine. As to the remaining memoranda, the determination of good cause seems to rest generally on a finding that a six year lapse of time would inevitably cause memories to dull coupled with findings apparently based on conclusions regarding the deficiencies of the nine depositions examined. In these instances more specific findings as to each individual would have been better. See *Hauger* v. *Chicago, Rock Island & Pacific Railroad Co.* (7th Cir., 1954), 216 F.2d 501, 505. We conclude, however, that lack of good cause has not been made to appear sufficiently for issuance of a writ of mandamus. Thus the order under attack will stand as to all debriefing memoranda except in those instances where we have determined in part (2) above that the corporation's attorney-client privilege protects from discovery.

A writ of mandamus will issue compelling respondent district judge to exempt from his order of October 17, 1969, the debriefing statements of the following: Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Rowe (as to Thomas Y. Crowell Company), Stokes, Davidson, Callaway, Witness A of Golden Press, Walker, Dyckman, Mitchell, Andrus, and Hoocker, and to order the return of each of those debriefing statements to the defendant which produced it. In all other respects the petition for mandamus is denied. Petitioners are to submit a proposed writ following the procedure prescribed by Rule 19 F.R.A.P. for settlement of judgments enforcing orders of agencies.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, February 4, 1970

Before

Hon. Roger J. Kiley, Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

Hon. Walter J. Cummings, Circuit Judge

No. 18008.

Harper & Row Publishers, Inc., et al., Petitioners,

vs.

Honorable Bernard M. Decker, United States District Judge, Respondent.

Petition for Writ of Mandamus.

This cause came before the Court on the petition for writ of mandamus, answer thereto, and briefs of the parties.

On consideration whereof, It Is Ordered And adjudged by this Court that a writ of mandamus will issue compelling respondent district judge to exempt from his order of October 17, 1969, the debriefing statements of the following: Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Rowe (as to Thomas Y. Crowell Company, Stokes, Davidson, Callaway, Witness A of Golden Press, Walker, Dyckman, Mitchell, Andrus, and Hoocker, and to order the return of each of those debriefing statements to the defendant which produced it.

It Is Further Ordered and adjudged by this Court that in all other respects the said petition for writ of mandamus is denied.

Petitioners are to submit a proposed writ following the procedure prescribed by Rule 19 F.R.A.P. for settlement of judgments enforcing orders of agencies, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, February 11, 1970

Before

Hon. Roger J. Kiley, Circuit Judge

Harper & Row Publishers, Inc., et al., Petitioners, vs. Honorable Bernard M. Decker, United States District Judge, Respondent.	No. 18008	Original Petition for Writ of Mandamus.

On consideration of the motion of counsel for respondents,

It Is Ordered that the issuance of the writ of mandamus be stayed for a period of thirty (30) days from this date, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure, pending application of respondents to the Supreme Court of the United States for a writ of certiorari and until final disposition thereof.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 11, 1970

Before

Hon. Roger J. Kiley, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

Harper & Row Publishers, Inc., et al., Petitioners,		Petition for Writ of Mandamus
No. 18008	vs.	
Honorable Bernard M. Decker, United States District Judge, et al., Respondents.		

ORDER

On February 4, 1970 an opinion was filed deciding that a writ of mandamus will issue and directing settlement of the form of the writ (see Rule 36, F.R.A.P.) upon submission of a proposed writ by petitioners, following the procedure prescribed by Rule 19, F.R.A.P. for settlement of judgments enforcing orders of agencies.

On February 12, 1970, petitioners filed a proposed writ of mandamus. Respondents did not file a counter proposal pursuant to Rule 19, F.R.A.P. Except for one matter, herein referred to as the Andresen memorandum, the writ proposed by petitioners is deemed to conform with our opinion.

The Andresen memorandum.

On February 12, petitioners filed a motion asking that we include the debriefing memorandum of Bruce Andresen among those listed in our opinion and our writ, to be exempted from respondent's order of October 17, 1969 and to be returned to the defendant which produced it. Petitioners assert that Bruce Andresen was an employee of petitioner Baker & Taylor Co. and that his debriefing memorandum is protected by the attorney-client privilege of Baker & Taylor Co., the same as that of Hood, Moorman, and Thompson. Respondents assert that Andresen was formerly employed by Golden Press, and we note that petitioners include in the proposed writ the statement taken from grand jury witness Golden Press "B-1", but petitioners claim that their motion relates only to the debriefing memorandum of Andresen given to counsel for Baker & Taylor Co.

We prefer to leave the resolution of any factual dispute to the district court. The writ of mandamus in final form will not include Andresen (nor Golden Press "B") in the list of grand jury witnesses the debriefing statements of whom will be ordered returned, but will include a direction that: "With respect to witness Bruce Andresen, the Honorable Bernard M. Decker shall determine whether, consistently with part (2) of our opinion, Andresen's debriefing memorandum produced by Baker & Taylor, or Golden Press 'B-1', is protected by the attorney-client privilege of Baker & Taylor Co., and shall deal with it accordingly."

The Rust and Mathiesen memoranda.

Two petitioners ask for clarification and modification of our opinion so as to compel respondent to order the

return of the debriefing memoranda of Paul Rust and John Mathiesen. These men were not employed by any of petitioners, but by another corporation, E. M. Hale & Co. It is claimed that Hale was an agent of two petitioners, and therefore that the attorney-client privilege of these two petitioners protects the communication between Rust and Mathiesen and petitioners' attorneys. Petitioners note that our opinion dealt with certain communications by an employee of the corporation asserting the privilege and did not refer to such communications by an agent who was not an employee. But whether or not a corporation's privilege will extend to a communication by its own agent who is not its employee, we are satisfied that the particular relationship of Rust and Mathiesen to the corporate petitioners does not entitle petitioners to protection against disclosure of the Rust and Mathiesen communications with petitioners' attorneys.

Costs.

Petitioners and respondents each seek allowance of costs in this proceeding in this court, virtually as if it were an appeal, subject to Rule 39 F.R.A.P. Petitioners seek $2,586.96 and respondents $1,141.13. Rule 39 is not literally applicable. We did not include any direction as to costs in our opinion, the petition was granted in part, denied in part, and we conclude in our discretion that no party is to recover costs in this proceeding in this court.

Accordingly, It Is Ordered,

(1) The form of the writ of mandamus will be as proposed by petitioners February 12, 1970, except (a) the name "Golden Press 'B-1'" will be omitted from the 6th and 7th lines from the bottom of page 2 and the name "Andresen" will be omitted from the third line from the

bottom of page 2 and (b) there shall be added an additional paragraph, as follows:

"With respect to witness Bruce Andresen, the Honorable Bernard M. Decker shall determine whether, consistently with part (2) of our opinion, Andresen's debriefing memorandum produced by Baker & Taylor Co. or Golden Press 'B-1' is protected by the attorney-client privilege of Baker & Taylor Co., and shall deal with it accordingly."

(2) Said writ shall not, however, be issued before expiration of the stay ordered February 11, or any extension thereof.

(3) The application of petitioners to add the Rust and Mathiesen memoranda to the list of those protected from discovery by our writ of mandamus is denied.

(4) the applications of the parties for recovery of costs are each denied.

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 67 C 1899)

(and related cases)

[STATEMENT RELATING TO MORRIS STOKES, CHARLES SCRIBNER'S]

Donald J. Williamson, being duly sworn, deposes and says:

(1) I am one of the attorneys who was assigned by the law firm of Weil, Gotshal & Manges to render legal advice sought by certain witnesses who appeared before a Federal Grand Jury convened by the United States District Court for the Northern District of Illinois to investigate the publication and distribution of library editions of children's books.

(2) On September 19, 1966, I accompanied Morris Stokes, then Director of Library Services of Charles Scribner's Sons, to Chicago for his appearance before said Grand Jury. Immediately after his appearance, I interrogated Mr. Stokes in an attempt to reconstruct, to the best of his recollection, his testimony before the Grand Jury. I took notes of Mr. Stokes' responses to my questions and on October 6, 1966 I reduced those notes to a formal memorandum embodying therein certain of my thought processes and impressions.

(3) The original of this memorandum was sent to the files of Weil, Gotshal & Manges. Copies of the memorandum were sent to Jra M. Millstein and Irving Scher, who were also attorneys of Weil, Gotshal & Manges responsible for the matter. No copy of the memorandum was sent to the witness or to his corporate employer.

(4) At the time Mr. Stokes appeared before the Grand Jury, Weil, Gotshal & Manges was acting as counsel for both him and his corporate employer, Charles Scribner's Sons which, we had reason to believe, was then one of the targets of the investigation.

(5) I respectfully submit that all communications between Mr. Stokes and me were in confidence and were made to me in my capacity as an attorney associated with Weil, Gotshal & Manges, his personal counsel as well as counsel for his corporate employer, and thus my memorandum of October 6, 1966, reflecting such confidential communications, is absolutely exempt from civil discovery as being within the attorney-client privilege. My memorandum of October 6, 1966 is exempt from civil discovery on the further ground that it is my attorney's work product, inasmuch as it reflects my mental processes and impressions reduced to writing for use in pending and impending legal proceedings.

/s/ Donald J. Williamson

In The United States District Court

(Caption—67 C 1899 And related cases)

[STATEMENT RELATING TO FRANK SCIOSIA, HARPER & ROW]

Donald J. Williamson, being duly sworn, deposes and says:

(1) I am one of the attorneys who was assigned by the law firm of Weil, Gotshal & Manges to render legal advice sought by certain witnesses who appeared before a Federal Grand Jury convened by the United States District Court for the Northern District of Illinois to investigate the publication and distribution of library editions of childrens books.

(2) On September 9, 1966, I accompanied Frank Sciosia, then sales manager of Harper & Row Publishers Incorporated, to Chicago for his appearance before said Grand Jury. Immediately after his appearance, I interrogated Mr. Sciosia in an attempt to reconstruct, to the best of his recollection, his testimony before the Grand Jury. I took notes of Mr. Sciosia's responses to my questions and on October 7, 1966 I reduced those notes to a formal memorandum embodying therein certain of my thought processes and impressions.

(3) The original of this memorandum was sent to the files of Weil, Gotshal & Manges. Copies of the memorandum were sent to Ira M. Millstein and Irving Scher, who were also attorneys of Weil, Gotshal & Manges responsible for the matter. No copy of the memorandum was sent to the witness or to his corporate employer.

(4) At the time Mr. Sciosia appeared before the Grand Jury, Weil, Gotshal & Manges was acting as counsel for both, him and his corporate employer, Harper & Row Publishers Incorporated which, we had reason to believe, was then one of the targets of the investigation.

(5) I respectfully submit that all communications between Mr. Sciosia and me were in confidence and were made to me in my capacity as as attorney associated with Weil, Gotshal & Manges, his personal counsel as well as counsel for his corporate employer, and thus my memorandum of October 7, 1966, reflecting such confidential communications, is absolutely exempt from civil discovery as being within the attorney-client privilege. My memorandum of October 7, 1966 is exempt from civil discovery on the further ground that it is my attorney's work product, inasmuch as it reflects my mental processes and impressions reduced to writing for use in pending and impending legal proceedings.

/s/ Donald J. Williamson

IN THE UNITED STATES DISTRICT COURT

(Caption—67 C 1899 And related cases)

[STATEMENT RELATING TO EDWARD PATELLA, GROSSET & DUNLAP]

Donald J. Williamson, being duly sworn, deposes and says:

(1) I am one of the attorneys who was assigned by the law firm of Weil, Gotshal & Manges to render legal advice sought by certain witnesses who appeared before a Federal Grand Jury convened by the United States District Court for the Northern District of Illinois to investigate the publication and distribution of library editions of childrens books.

(2) On September 9, 1966, I accompanied Edward Patella, then a salesman for Grosset & Dunlap, Inc., to Chicago for his appearance before said Grand Jury. Immediately after his appearance, I interrogated Mr. Patella in an attempt to reconstruct, to the best of his

recollection, his testimony before the Grand Jury. I took notes of Mr. Patella's responses to my questions and on October 6, 1966 I reduced those notes to a formal memorandum embodying therein certain of my thought processes and impressions.

(3) The original of this memorandum was sent to the files of Weil, Gotshal & Manges. Copies of the memorandum were sent to Ira M. Millstein and Irving Scher, who were also attorneys of Weil, Gotshal & Manges responsible for the matter. No copy of the memorandum was sent to the witness or to his corporate employer.

(4) At the time Mr. Patella appeared before the Grand Jury, Weil, Gotshal & Manges was acting as counsel for both him and his corporate employer, Grosset & Dunlap, Inc. which, we had reason to believe, was then one of the targets of the investigation.

(5) I respectfully submit that all communications between Mr. Patella and me were in confidence and were made to me in my capacity as an attorney associated with Weil, Gotshal & Manges his personal counsel as well as counsel for his corporate employer, and thus my memorandum of October 6, 1966, reflecting such confidential communications, is absolutely exempt from civil discovery as being within the attorney-client privilege. My memorandum of October 6, 1966 is exempt from civil discovery on the further ground that it is my attorney's work product, inasmuch as it reflects my mental processes and impressions reduced to writing for use in pending and impending legal proceedings.

/s/ Donald J. Williamson

IN THE UNITED STATES DISTRICT COURT

(Caption—67 C 1899 And related cases)

[STATEMENT RELATING TO ROBERT GUERNEY, HARPER & ROW]

Donald J. Williamson, being duly sworn, deposes and says:

(1) I am one of the attorneys who was assigned by the law firm of Weil, Gotshal & Manges to render legal advice sought by certain witnesses who appeared before a Federal Grand Jury convened by the United States District Court for the Northern District of Illinois to investigate the publication and distribution of library editions of childrens books.

(2) On September 23, 1966, I accompanied Robert Guerney, then a salesman of Harper & Row Publishers Incorporated, to Chicago for his appearance before said Grand Jury. Immediately after his appearance, I interrogated Mr. Guerney in an attempt to reconstruct, to the best of his recollection, his testimony before the Grand Jury. I took notes of Mr. Guerney's responses to my questions and on October 5, 1966 I reduced those notes to a formal memorandum embodying therein certain of my thought processes and impressions.

(3) The original of this memorandum was sent to the files of Weil, Gotshal & Manges. Copies of the memorandum were sent to Ira M. Millstein and Irving Scher, who were also attorneys of Weil, Gotshal & Manges responsible for the matter. No copy of the memorandum was sent to the witness or his corporate employer.

(4) At the time Mr. Guerney appeared before the Grand Jury, Weil, Gotshal & Manges was acting as counsel for both him and his corporate employer, Harper & Row, Publishers, Incorporated which, we had reason to

believe, was then one of the targets of the investigation.

(5) I respectfully submit that all communications between Mr. Guerney and me were in confidence and were made to me in my capacity as an attorney associated with Weil, Gotshal & Manges, his personal counsel as well as counsel for his coroporate employer, and thus my memorandum of October 5, 1966, reflecting such confidential communications, is absolutely exempt from civil discovery as being within the attorney-client privilege. My memorandum of October 5, 1966 is exempt from civil discovery on the further ground that it is my attorney's work product, inasmuch as it reflects my mental processes and impressions reduced to writing for use in pending and impending legal proceedings.

/s/ Donald J. Williamson

IN THE UNITED STATES DISTRICT COURT

(Caption—67 C 1899 And related cases)

[STATEMENT RELATING TO IRVING DAVIDSON, GROSSET & DUNLAP]

Donald J. Williamson, being duly sworn, deposes and says:

(1) I am one of the attorneys who was assigned by the law firm of Weil, Gotshal & Manges to render legal advice sought by certain witnesses who appeared before a Federal Grand Jury convened by the United States District Court for the Northern District of Illinois to investigate the publication and distribution of library editions of childrens books.

(2) On September 19, 1966, I accompanied Irving Davidson, then a salesman for Grosset & Dunlap Inc., to Chicago for his appearance before said Grand Jury. Immediately after his appearance, I interrogated Mr. Davidson

in an attempt to reconstruct, to the best of his recollection, his testimony before the Grand Jury. I took notes of Mr. Davidson's responses to my questions and on October 6, 1966 I reduced those notes to a formal memorandum embodying therein certain of my thought processes and impressions.

(3) The original of this memorandum was sent to the files of Weil, Gotshal & Manges. Copies of the memorandum were sent to Ira M. Millstein and Irving Scher, who were also attorneys of Weil, Gotshal & Manges responsible for the matter. No copy of the memorandum was sent to the witness or his corporate employer.

(4) At the time Mr. Davidson appeared before the Grand Jury, Weil, Gotshal & Manges was acting as counsel for both him and his corporate employer, Grosset & Dunlap, Inc. which, we had reason to believe, was then one of the targets of the investigation.

(5) I respectfully submit that all communications between Mr. Davidson and me were in confidence and were made to me in my capacity as an attorney associated with Weil, Gotshal & Manges, his personal counsel as well as counsel for his corporate employer, and thus my memorandum of October 6, 1966, reflecting such confidential communications, is absolutely exempt from civil discovery as being within the attorney-client privilege. My memorandum of October 6, 1966 is exempt from civil discovery on the further ground that it is my attorney's work product, inasmuch as it reflects my mental processes and impressions reduced to writing for use in pending and impending legal proceedings.

/s/ Donald J. Williamson

IN THE UNITED STATES DISTRICT COURT

(Caption—67 C 1899 And related cases)

[STATEMENT RELATING TO
JAMES F. HEIDELBERGER, E. P. DUTTON]

Donald J. Williamson, being duly sworn, deposes and says:

(1) I am one of the attorneys who was assigned by the law firm of Weil, Gotshal & Manges to render legal advice sought by certain witnesses who appeared before a Federal Grand Jury convened by the United States District Court for the Northern District of Illinois to investigate the publication and distribution of library editions of childrens books.

(2) On October 26, 1966, I accompanied James F. Heidelberger, then sales manager of E. P. Dutton & Co. Inc., to Chicago for his appearance before said Grand Jury. Immediately after his appearance, I interrogated Mr. Heidelberger in an attempt to reconstruct, to the best of his recollection, his testimony before the Grand Jury. I took notes of Mr. Heidelberger's responses to my questions and on October 27, 1969 I reduced those notes to a formal memorandum embodying therein certain of my thought processes and impressions.

(3) The original of this memorandum was sent to the files of Weil, Gotshal & Manges. Copies of the memorandum were sent to Ira M. Millstein and Irving Scher, who were also attorneys of Weil, Gotshal & Manges responsible for the matter. No copy of the memorandum was sent to the witness or his corporate employer.

(4) At the time Mr. Heidelberger appeared before the Grand Jury, Weil, Gotshal & Manges was acting as counsel for both him and his corporate employer, E. P. Dutton & Co., Inc. which, we had reason to believe, was then one of the targets of the investigation.

(5) I respectfully submit that all communications between Mr. Heidelberger and me were in confidence and were made to me in my capacity as an attorney associated with Weil, Gotshal & Manges, his personal counsel as well as counsel for his corporate employer, and thus my memorandum of October 27, 1966, reflecting such confidential communications, is absolutely exempt from civil discovery as being within the attorney-client privilege. My memorandum of October 27, 1966 is exempt from civil discovery on the further ground that it is my attorney's work product, inasmuch as it reflects my mental processes and impressions reduced to writing for use in pending and impending legal proceedings.

/s/ Donald J. Williamson

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 67 C 1899 and related cases)

STATEMENT OF GOLDEN PRESS, INC.
[RELATING TO WITNESSES "A", "B" AND "D"]

Pursuant to this Court's order of August 7, 1969 and its directions given in proceedings of that date, we submit herewith a sealed envelope containing debriefing memoranda with respect to witnesses who testified before the grand jury referred to in the August 7, 1969 proceedings and order, to wit, Northern District of Illinois 66 GJ 3003. The documents have been marked for identification with the letters "A," "B," "B-1," "C," "D," and "E" respectively.

We strongly urge that disclosure of such documents in this litigation should be denied, since disclosure would violate the attorney-client privilege and the law concerning work-product of counsel.

None of the documents was shown to persons other than counsel.

The circumstances under which each document was prepared are as follows:

Document A. The witness was an employee of Golden Press, Inc. at the times of his testimony and debriefing. He was debriefed by Myron M. Cherry, presently a partner and then an associate, in the law firm McDermott, Will & Emery, which is counsel for Golden Press, Inc. and also acted as counsel for the witness. Further, the witness was a regional sales manager of Golden Press, Inc. and therefore was acting for Golden Press, Inc. in making communications to and receiving advice from counsel.

The day before the witness was scheduled to appear before the grand jury, Mr. Cherry and I conferred with him to advise him with respect to grand jury procedure and his legal rights. We also questioned him in order to determine the facts within his knowledge, told him to answer all questions truthfully to the best of his recollection, and advised him with respect to his right to immunity from prosecution which would derive from his testimony under subpoena, and as to possible legal issues as they might affect him, personally, and his employer Golden Press, Inc.

Immediately after completing his testimony before the grand jury, the witness met with Mr. Cherry in our offices. No one else was present at the meeting except my secretary, who took the notes and typed the enclosed memorandum. The memorandum was dictated primarily by counsel, Mr. Cherry, rather than by the witness. The procedure, essentially, was that Mr. Cherry asked the witness whether government counsel asked certain questions or referred to certain documents and discussed the wit-

ness' recollection with respect thereto. After each of counsel's questions was answered, *counsel* dictated the contents in the form of a question and answer, as appears in the memorandum. Thus, the memorandum consists of dictation by counsl based upon communications from his client, given in answer to counsel's questions. In addition, the memorandum contains reflections and opinions of counsel commenting upon the information received from the witness.

The memorandum was typewritten in the late afternoon and early evening, and to the best of our recollection, the witness never saw it. Moreover, nobody except counsel ever saw the memorandum.

Documents B and B-1. The witness was a former employee of Golden Press, Inc., and at the time of his testimony and for approximately six months prior thereto was an employee of a co-defendant in the captioned litigation. At the time of his testimony and debriefing, the witness, as well as Golden Press, Inc., and the witness' then current employer were all potential co-defendants in government and private litigation involving library editions of children's books, the subject of the grand jury inquiry.

The witness specifically requested that we counsel him in conjunction with advice he was receiving from his other counsel, who was also his then employer's counsel. Thus, we were acting both as counsel for Golden Press, Inc. and co-counsel for the witness.

On the day prior to his appearance before the grand jury, Myron M. Cherry and I met with the witness at the offices of his other counsel, who were also present, to advise him with respect to his constitutional rights and grand jury procedure. We also ascertained by questioning the witness such information as he had with respect

to library editions of children's books. In accordance with our regular practice, we notified the witness of his right to immunity from prosecution based upon his testimony under subpoena and advised him to answer all questions truthfully, to the best of his recollection. Counsel also advised him generally as to possible legal issues involved in the grand jury investigation as they might affect him personally or his employer or former employer.

After the witness completed his testimony before the grand jury, he met at the offices of his other counsel with said counsel and with Mr. Cherry of our firm. Nobody else was present at that meeting. Both counsel asked questions of the witness and made comments concerning the information given by the witness. The interview was conducted substantially on a question and answer basis, and the conference was recorded. There were frequent periods during which counsel entered into extended discussion with each other.

The information obtained from the witness concerning his testimony before the grand jury, thus, was obtained briefly as a result of counsel's questions.

At the conclusion of the meeting, it was agreed by Mr. Cherry and the witness' other counsel that the latter would have the recorded material transcribed and revised into a memorandum form. We have no direct knowledge as to whether other counsel showed the memorandum to the witness, but, pursuant to an understanding between counsel, we received from them a draft summarizing the aforesaid conference with the witness. This draft is enclosed under seal. We have no other document relating to that witness' testimony, but it is our understanding that the enclosed document was intended to be only a rough draft.

Two days after the witness testified, Mr. Cherry of our office wrote a memorandum to the file, a page and a half

of which contained Mr. Cherry's own recollections and observations with respect to the information he had obtained from the witness concerning his testimony before the grand jury. We enclose a copy of that page and a half, and have marked it as Exhibit B-1. That document was the work product of Mr. Cherry and also contains information constituting confidential communications by client to attorney.

Document D. The witness was a former employee of a predecessor of Golden Press. He also was a former employee of a different co-defendant publisher. At the times of his testimony before the grand jury and the preparation of the enclosed debriefing memorandum, he was employed by a still different company, which, however, is also a defendant in the captioned cases, and which, at the times of the testimony and memorandum, was a potential co-defendant with Golden Press and the other publisher referred to, as well as with the witness, in prospective government and private litigation involving library editions of children's books.

After the witness testified before the grand jury, he was interviewed jointly by Mr. Cherry of our firm and counsel for both the aforementioned co-defendants. Mr. Cherry participated actively in questioning the witness and eliciting the information contained in the memorandum. The memorandum in our files was prepared by one of co-defendant's counsel (the then current employer's counsel) after the aforesaid conference and forwarded to us as counsel for a prospective co-defendant. The document contains comments of the witness and of counsel on matters beyond the content of the testimony before the grand jury. Such communications are privileged communications between client and attorney, and the furnish-

ing of a copy to counsel for co-defendant Golden Press did not cause a waiver of that privilege, since it was an act of cooperation by counsel for prospective co-defendants.

Further, because the memorandum is replete with comments by counsel, its essential content represents the work-product of counsel.

The memorandum was not disclosed to anybody except counsel.

For the foregoing reasons, the memorandum is protected against discovery by the attorney-client privilege, which we understand is being asserted by counsel for the witness and for the co-defendant, and by the work-product doctrine.

Samuel Weisbard

UNITED STATES DISTRICT COURT

(Caption — No. 67 C 1899 And Related Cases)

STATEMENT OF DEFENDANT THOMAS J. CROWELL COMPANY, INC., CONCERNING A MEMORANDUM RELATING TO THE GRAND JURY TESTIMONY OF LESLIE ROWE

1. This statement concerns a file memorandum dated October 11, 1966, prepared by R. Andrew Boose, Esq., an attorney associated with the firm of Greenbaum, Wolff & Ernst, counsel for defendant Thomas Y. Crowell Company, Inc. (hereinafter referred to as "the memorandum"). The memorandum relates to the testimony of Leslie Rowe, Assistant Sales Manager of defendant Thomas Y. Crowell

Company, Inc. before a Federal Grand Jury in Chicago, Illinois on September 21, 1966. A Xerox copy of the memorandum was filed with the Court under seal on August 21, 1969.

2. Defendant Thomas Y. Crowell Company, Inc. objects to disclosure of the memorandum to plaintiffs herein (a) because the confidentiality of the memorandum is protected by the attorney-client privilege, and (b) because the memorandum embodies the work-product of Messrs. Greenbaum, Wolff & Ernst, counsel for defendant Thomas Y. Crowell Company, Inc.

3. Mr. Boose prepared the memorandum to record the events which transpired at his October 11, 1966 meeting with Mr. Rowe and Maurice C. Greenbaum, Esq., a partner in the firm of Greenbaum, Wolff & Ernst; no other person was present at that meeting. That meeting was held to enable Mr. Rowe to inform Messrs. Greenbaum and Boose (acting as counsel for defendant Thomas Y. Crowell Company, Inc.) about the substance of his grand jury testimony, so that Messrs. Greenbaum and Boose (and their firm) could provide appropriate legal advice to defendant Thomas Y. Crowell Company, Inc. with respect to certain matters which were then pending.

4. The memorandum records Mr. Boose's recollection of what transpired at that October 11, 1966 meeting, and it also records Mr. Boose's observations, comments and impressions about Mr. Rowe's report of his appearance before the grand jury. The memorandum also reflects the manner in which Messrs. Greenbaum and Boose conducted the meeting and questioned Mr. Rowe, and it thereby reflects their judgment regarding the relative importance of the various subjects which were discussed during that meeting. In addition, the arrangement of the memorandum, the particular information which it contains, the emphasis

which it places upon certain subjects, and the underlinings and marginal notations which appear on its face, all reflect Mr. Boose's judgment regarding the significance of the matters which are reported therein.

5. The memorandum has not been shown to, or read by, any individual other than attorneys associated with the firms of Greenbaum, Wolff & Ernst and Mayer, Friedlich, Spiess, Tierney, Brown & Platt (which firms are counsel for defendant Thomas Y. Crowell Company, Inc. in New York and Chicago respectively), and those attorneys have reviewed the document only in their role as such counsel. No copy of the memorandum ever was given to Thomas Y. Crowell Company, Inc., and neither Mr. Rowe nor any other individual at Thomas Y. Crowell Company, Inc. has seen the memorandum.

/s/ Lee N. Abrams

IN THE UNITED STATES DISTRICT COURT

(Caption — No. 67 C 1899 And Related Cases)

[STATEMENT RELATING TO JOHN M. CALLAWAY, G. P. PUTNAM'S SONS]

DAVID W. SLOAN, being duly sworn, deposes and says:

1. I am an attorney at law and a member of the law firm of Parker, Duryee, Zunino, Malone & Carter, 1 East 44th Street, New York, New York, counsel for G. P. Putnam's Sons, a New York corporation.

2. This affidavit is submitted in compliance with the Court's order of August 7, 1969, granting Plaintiffs' Rule 34 motions dated July 28, 1969. It constitutes a factual

statement setting forth the circumstances of preparation of the undated memorandum, 5 pages in length, which is attached hereto as Exhibit A.

3. On behalf of my firm and my clients, I submit that the Plaintiffs are not entitled to examine the memorandum attached hereto as Exhibit A, based upon the attorney-client privilege and the work product doctrine.

4. Mr. Callaway was employed as the Institutional Manager of G. P. Putnam's Sons from June, 1962 through June, 1966 and was Sales Manager of G. P. Putnam's Sons from July, 1966 to July, 1968. The Institutional Manager is responsible for developing sales in the general institutional market which includes local, state and federal educational and library markets. He is additionally responsible for the recruitment and training of sales personnel of the corporation. The Sales Manager of the corporation is responsible for supervising the activities of the Institutional Manager as well as the activities of the Sales Managers in other areas of the corporation's interests and the managers of advertising, publicity and promotion of the corporation's books. In addition, Mr. Callaway was a Vice President in charge of sales and Assistant Secretary.

5. Sometime prior to Mr. Callaway's testimony before a Grand Jury in Chicago, Illinois on September 14, 1966, he called to advise me that he had received a subpoena to make an appearance before the Grand Jury and asked me to advise him as to his rights, duties and obligations in respect thereto. In addition, my firm was acting at that time as counsel for his employer, G. P. Putnam's Sons. In response to Mr. Callaway's requests and in furtherance of the interests of his employer whom we represented, I met with Mr. Callaway prior to his testimony to discuss

the subpoena. As a result of that meeting and pursuant to my instructions, Mr. Callaway immediately after his testimony on September 14, 1966 returned to his hotel room in Chicago, Illinois and typed the memorandum which is attached hereto as Exhibit A.

Upon his return to New York, he met with me and my partner, James G. Bernheim, to discuss his testimony and to answer certain questions we had. The handwritten notations appearing on the memorandum are those of Mr. Bernheim and were written as a result of the answers furnished by Mr. Callaway to our questions. This meeting in New York City occurred at the offices of my firm sometime in September, 1966.

Other than my partner, James G. Bernheim, and other attorneys representing G. P. Putnam's Sons in the various treble damage actions which have been commenced since 1966 and in which G. P. Putnam's Sons is a party, no other person has read the contents of this document other than Mr. Walter J. Minton, President of G. P. Putnam's Sons and Mr. Victor C. Thaller, Vice President and Treasurer of G. P. Putnam's Sons. In connection with my firm's representation of that corporation, I furnished a copy of the same to each of such officers for their analysis and comment. However, no other person other than my secretary, to my knowledge, has seen such memorandum.

/s/ David W. Sloan

IN THE UNITED STATES DISTRICT COURT

(Caption — Civil Action No. 67 C 1899

And/Or Related Cases)

AFFIDAVIT OF BRINTON P. ROBERTS, ESQ. [RELATING TO JOE WALKER, HOUGHTON MIFFLIN CO.]

BRINTON P. ROBERTS, being duly sworn, deposes and says as follows:

1. He is an attorney admitted to practice before the Courts of the Commonwealth of Massachusetts, the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit and that he is presently and has, since September 1965, been associated with the law firm of Choate, Hall & Stewart ("Choate Hall").

2. Choate Hall is, and has been since prior to 1966, general legal counsel for Houghton Mifflin Company ("Houghton Mifflin"). As such, Choate Hall in the summer of 1966 was requested by Houghton Mifflin to represent and counsel Houghton Mifflin with respect to subpoenae received by Houghton Mifflin in connection with a grand jury investigation instituted in the Northern District of Illinois and with respect to any and all matters related to or arising out of said investigation. Choate Hall has represented and counselled, and is representing and counselling, Houghton Mifflin in connection with all said matters, including the legal proceedings in which this affidavit is to be filed, and affiant has personal knowledge of said matters.

3. During the summer of 1966 the law firm of Kirkland, Ellis, Hodson, Chaffetz and Masters of Chicago, Illinois ("Kirkland Ellis") was retained to assist Choate Hall in representing and counselling Houghton Mifflin in connection with said grand jury investigation. Houghton Mifflin

was billed by Kirkland Ellis for said services and has paid said bill.

4. Affiant is informed and believes that on September 19, 1966 in rendering the legal services requested of Kirkland Ellis, Attorney Frank Cicero, Jr., an associate of Kirkland Ellis, interviewed Joe Walker, the then Manager of the Institutional Department of Houghton Mifflin, following Joe Walker's appearance before said grand jury, in the offices of Kirkland Ellis, at which interview were present only Joe Walker, Attorney Cicero and perhaps Attorney Fred H. Bartlit, Jr., a partner in Kirkland Ellis.

5. Affiant is informed and believes that following said interview Attorney Frank Cicero caused to be prepared six (6) copies of a memorandum setting forth Attorney Frank Cicero's recollection of the interview, of which four (4) copies were retained by Kirkland Ellis and were, following the completion of the services of Kirkland Ellis, destroyed in the normal course of business without being disclosed to anyone other than partners or associates of Kirkland Ellis.

6. Kirkland Ellis caused to be delivered to Choate Hall the other two (2) copies of the said memorandum. Said two (2) copies are in the files of Choate Hall and have not been examined by anyone other than partners or associates of Choate Hall.

7. Three (3) copies of one of the two (2) copies of said memorandum have been made by Choate Hall for the following purposes:

(a) One to be filed as required by the order, dated August 7, 1969, of the Court in which this affidavit is to be filed;

(b) One to be delivered to the law firm of Mayer, Friedlich, Spiess, Tierney, Brown & Platt of Chicago, Illinois, ("Mayer Friedlich") presently counsel for Houghton Mifflin in connection with the legal proceedings for which this affidavit is prepared; and

(c) One for review by Joe Walker during the summer of 1969 in connection with the defense of the legal proceedings for which this affidavit is prepared.

8. During and in connection with the matter referred to in paragraph 7(c), Choate Hall and Joe Walker gave Austin Olney, a Director of Houghton Mifflin and Sales Manager of the Trade Division of Houghton Mifflin, permission and the opportunity to examine the photostatic copy referred to in paragraph 7(c), but affiant is informed by Austin Olney and believes that Austin Olney does not recall reading or examining any document pertaining to the testimony of Joe Walker before the aforesaid grand jury.

9. Affiant is informed and believes that, except as indicated herein, no copy or original of the said memorandum prepared by Attorney Frank Cicero, Jr., has been disclosed to anyone.

10. Affiant is informed and believes that the contents of said memorandum have not been disclosed to anyone except by or among attorneys in Choate Hall, Kirkland Ellis, and Mayer Friedlich and Joe Walker

Further affiant sayeth not.

/s/ Brinton P. Roberts

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 67 C 1899)

AFFIDAVIT OF BRINTON P. ROBERTS, ESQ. [RELATING TO FRANCIS H. DYCKMAN JR., HOUGHTON MIFFLIN CO.]

BRINTON P. ROBERTS, being duly sworn, deposes and says as follows:

1. He is an attorney admitted to practice before the Courts of the Commonwealth of Massachusetts, the United

States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit and that he is presently and has, since September 1965, been associated with the law firm of Choate, Hall and Stewart ("Choate Hall").

2. Choate Hall is, and has been since prior to 1966, general legal counsel for Houghton Mifflin Company ("Houghton Mifflin"). As such, Choate Hall in the summer of 1966 was requested by Houghton Mifflin to represent and counsel Houghton Mifflin with respect to subpoenae received by Houghton Mifflin in connection with a grand jury investigation instituted in the Northern District of Illinois and with respect to any and all matters related to or arising out of said investigation. Choate Hall has represented and counselled, and is representing and counselling, Houghton Mifflin in connection with all said matters, including the legal proceedings in which this affidavit is to be filed, and affiant has personal knowledge of said matters.

3. During the summer of 1966 the law firm of Kirkland, Ellis, Hodson, Chaffetz and Masters of Chicago, Illinois ("Kirkland Ellis") was retained to assist Choate Hall in representing and counselling Houghton Mifflin in connection with said grand jury investigation. Houghton Mifflin was billed by Kirkland Ellis for said services and has paid said bill.

4. Affiant is informed and believes that on September 21, 1966 in rendering the legal services requested of Kirkland Ellis, Attorney Frank Cicero, Jr., an associate of Kirkland Ellis, interviewed Francis H. Dyckman, Jr., the Manager of the New York Office of The Trade Division of Houghton Mifflin, following Francis H. Dyckman, Jr's. appearance before the said grand jury, in the offices of Kirkland Ellis, at which interview were present only Joe Walker, Attorney Cicero and perhaps

Attorney Fred H. Bartlit, Jr., a partner in Kirkland Ellis.

5. Affiant is informed and believes that following said interview, Attorney Frank Cicero caused to be prepared five (5) copies of a memorandum setting forth Attorney Frank Cicero's recollection of the interview, of which three (3) copies were retained by Kirkland Ellis and were, following the completion of the services of Kirkland Ellis, destroyed in the normal course of business without being disclosed to anyone other than partners or associates of Kirkland Ellis.

6. Kirkland Ellis caused to be delivered to Choate Hall the other two (2) copies of the said memorandum. Said two (2) copies are in the files of Choate Hall and have not been examined by other than partners or associates of Choate Hall.

7. Three (3) copies of one of the two (2) copies of said memorandum have been made by Choate Hall for the following purposes:

(a) One to be filed as required by the order, dated August 7, 1969, of the Court in which this affidavit is to be filed;

(b) One to be delivered to the law firm of Mayer, Friedlich, Spiess, Tierney, Brown & Platt of Chicago, Illinois ("Mayer Friedlich") presently counsel for Houghton Mifflin in connection with the legal proceedings in which this affidavit is to be filed; and

(c) One for review by Francis H. Dyckman, Jr. during the summer of 1969 in connection with the defense of the legal proceedings for which this affidavit is prepared.

8. Affiant is informed and believes that, except as indicated herein, no copy or original of the said memorandum prepared by Attorney Frank Cicero, Jr. has been disclosed to anyone.

9. Affiant is informed and believes that the contents of said memorandum have not been disclosed to anyone except by or among the attorneys in Choate Hall, Kirkland Ellis, and Mayer Friedlich and Francis H. Dyckman, Jr.

Further affiant sayeth not.

/s/ Brinton P. Roberts

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 67 C 1899)

(And Related Cases)

STATEMENT OF
DEFENDANT CAMPBELL & HALL, INC.
WITH RESPECT TO MEMORANDA
RELATIVE TO GRAND JURY TESTIMONY
[OF ALBERT P. MITCHELL AND RUPERT ANDRUS]

Pursuant to Order of this Court dated August 7, 1969, defendant Campbell & Hall, Inc. has filed herewith in a sealed envelope a memorandum relative to the grand jury testimony of Albert P. Mitchell and a memorandum relative to the grand jury testimony of Rupert Andrus. Mr. Mitchell and Mr. Andrus are employees of Campbell & Hall, Inc. and were such at the time the memoranda were prepared.

The memoranda record the recollection of Messrs. Mitchell and Andrus as to what transpired in the course of their respective interrogations before the grand jury. Each of these memoranda was prepared by David F. Cavers, Jr. of Palmer, Dodge, Gardner &

Bradford, Boston, Massachusetts, and David P. List of Leibman, Williams, Bennett, Baird & Minow, Chicago, Illinois, counsel for Campbell & Hall, Inc. Each of the memoranda was typed by employees of Leibman, Williams, Bennett, Baird & Minow, Mr. List's law firm, and copies of these memoranda were retained in the files of Palmer, Dodge, Gardner & Bradford and Leibman, Williams, Bennett, Baird & Minow, and were not exhibited to or delivered to Campbell & Hall, Inc., or to the respective witnesses.

Dated: August 25, 1969.

/s/ David P. List

IN THE UNITED STATES DISTRICT COURT

(Caption — No. 67 C 1899 and related cases)

STATEMENT OF BAKER & TAYLOR WITH RESPECT TO DOCUMENTS PRODUCED IN RESPONSE TO PARAGRAPH ONE OF PLAINTIFF'S RULE 34 MOTION [RELATING TO ALAN HOOD, JAMES THOMPSON AND BRUCE ANDRESEN]

In accordance with the Court's order of August 7, 1969 concerning production of documents by defendants, Baker & Taylor Co. submits herewith a sealed envelope containing documents responsive to Paragraph 1 of plaintiffs' motion for production of documents. These documents consist of separate memoranda by counsel concerning the testimony of each of Baker & Taylor's employees appearing before the Grand Jury in the proceeding in the Northern District of Illinois docketed as 66 G.J. 2003.

Disclosure of such documents in this litigation would constitute a violation of the attorney-client privilege and would be contrary to the rules concerning the work product of counsel.

The circumstances under which each document was prepared are as follows:

1. Each document was prepared by counsel for possible future use by counsel.

2. Messrs. Sonnenschein Levinson Carline Nath & Rosenthal are counsel to both the individuals and Baker & Taylor in these matters and have acted in that capacity.

3. Each witness met with counsel following his testimony before the Grand Jury. No one else was present at these meetings.

4. In the case of Alan C. Hood, counsel had a discussion with Mr. Hood and counsel then prepared a memorandum summarizing Mr. Hood's recollection of the questions asked and answers given. In all other instances, counsel interviewed the witness on a question and answer basis. In such cases, the witness' statements were recorded on a dictating machine. At frequent intervals, counsel would ask questions of the witness. These would be answered by speaking into the machine. On occasion, the dictation was interrupted for extended discussion with counsel. Subsequent to such discussion the witness would resume dictation and might erase and revise portions of the dictation as a result of the further interrogation by counsel. The dictation belts were then transcribed by a secretary. The transcript was then revised by counsel into memorandum form.

5. The memoranda prepared by counsel were given to the witness for review and correction and return to counsel.

6. Counsel did not show such memoranda to the witness at any subsequent time. Specifically, such memoranda were not shown to witnesses prior to depositions taken in this cause.

Counsel respectfully request that they be given no less than seven days' prior notice of any in camera examination of the contents of the attached envelope or of any ruling with respect to the turnover of such documents to plaintiffs so as to permit them to take appropriate steps in accordance with the privileged character of the documents.

Earl E. Pollock
Alan H. Silberman

UNITED STATES DISTRICT COURT

(Caption—No. 67 C 1899 And Related Cases)

STATEMENT OF DEFENDANT DAVID McKAY COMPANY, INC. CONCERNING A MEMORANDUM RELATING TO THE GRAND JURY TESTIMONY OF WILLIAM HOOCKER

1. This statement concerns a memorandum dated September 19, 1966, prepared by R. Andrew Boose, Esq., an attorney associated with the firm of Greenbaum, Wolff & Ernst, counsel for defendant David McKay Company, Inc. (hereinafter referred to as "the memorandum"); the original of the memorandum was directed to the files of Greenbaum, Wolff & Ernst, and copies of it were sent to two members of that firm. The memorandum relates to the testimony of William Hoocker, an employee of defendant David McKay Company, Inc., before a Federal Grand

Jury in Chicago, Illinois on September 19, 1966. A Xerox copy of the memorandum was filed with the Court under seal on August 21, 1969.

2. Defendant David McKay Company, Inc. objects to disclosure of the memorandum to plaintiffs herein (a) because the confidentiality of the memorandum is protected by the attorney-client privilege, and (b) because the memorandum embodies the work-product of Messrs. Greenbaum, Wolff & Ernst, counsel for defendant David McKay Company, Inc.

3. Mr. Boose prepared the memorandum to record the events which transpired at his October 4, 1966 meeting with Mr. Hoocker and Maurice C. Greenbaum, Esq., a partner in the firm of Greenbaum, Wolff & Ernst; no other person was present at that meeting. That meeting was held to enable Mr. Hoocker to inform Messrs. Greenbaum and Boose (acting as counsel for defendant David McKay Company, Inc.) about the substance of his grand jury testimony, so that Messrs. Greenbaum and Boose (and their firm) could provide appropriate legal advice to defendant David McKay Company, Inc. with respect to certain matters which were then pending.

4. The memorandum records Mr. Boose's recollection of what transpired at that October 4, 1966 meeting, and also records his observations, comments and impressions about Mr. Hoocker's report of his appearance before the grand jury. The memorandum also reflects the manner in which Messrs. Greenbaum and Boose conducted the meeting and questioned Mr. Hoocker, and it thereby reflects their judgment regarding the relative importance of various subjects which were discussed during that meeting. In addition, the arrangement of the memorandum, the particular information which it contains, the emphasis which it places upon certain subjects, and the underlinings

and marginal notations which appear on its face, all reflect Mr. Boose's judgment regarding the significance of the matters which are reported therein.

5. The memorandum has not been shown to, or read by, any individual other than attorneys associated with the firms of Greenbaum, Wolff & Ernst and Mayer, Friedlich, Spiess, Tierney, Brown & Platt (which firms are counsel for defendant David McKay Company, Inc. in New York and Chicago respectively), and those attorneys have reviewed the document only in their role as such counsel. No copy of the memorandum ever was given to David McKay Company, Inc., and neither Mr. Hoecker nor any other individual at David McKay Company, Inc. has seen the memorandum.

/s/ Lee N. Abrams